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No. 839

IN THE

SUPREME COURT OF THE UNITED STATES

STRICKLAND TRANSPORTATION CO., INC.,
Appellant,

Vs.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, CENTRAL FREIGHT LINES, INC., HERRIN TRANSPORTATION COMPANY, INC., ROADWAY EXPRESS, INC., MISSOURI PACIFIC RAILROAD COMPANY and SOUTHERN PACIFIC COMPANY,
Appellees.

ON APPEAL FROM NO. CA-3-1932
IN THE UNITED STATES DISTRICT COURT
FROM THE NORTHERN DISTRICT OF TEXAS,
DALLAS DIVISION

JURISDICTIONAL STATEMENT

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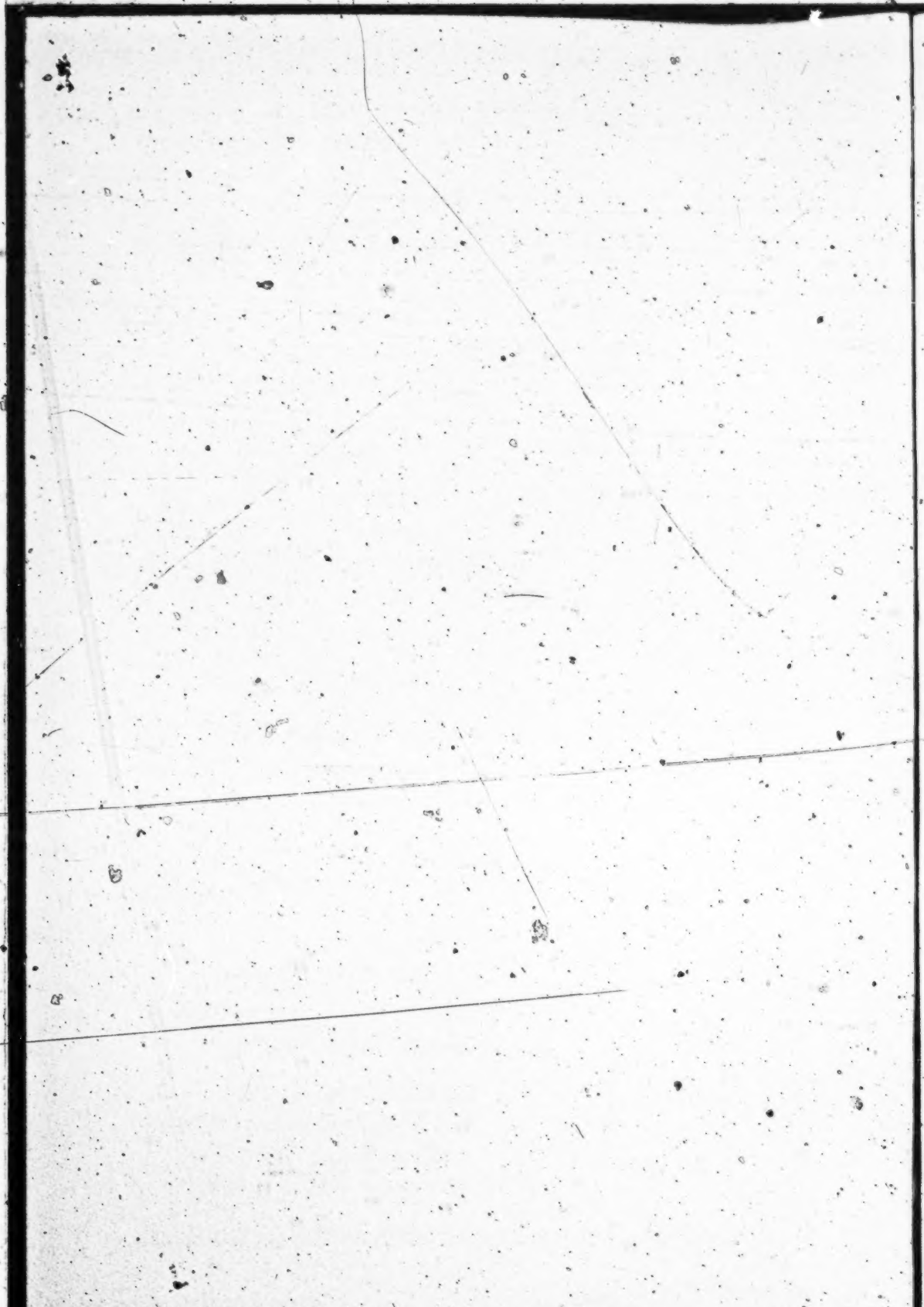

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IN THE

SUPREME COURT OF THE UNITED STATES

STRICKLAND TRANSPORTATION CO., INC.,
Appellant,

VS.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, CENTRAL FREIGHT LINES, INC., HERRIN TRANSPORTATION COMPANY, INC., ROADWAY EXPRESS, INC., MISSOURI PACIFIC RAILROAD COMPANY and SOUTHERN PACIFIC COMPANY,
Appellees.

ON APPEAL FROM NO. CA-3-1932 IN THE UNITED STATES DISTRICT COURT FROM THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the United States District Court for the Northern District of Texas, Dallas Division, entered August 24, 1967, pursuant to the decision of the three-judge court of August 7, 1967, upholding as valid an order of the Interstate Commerce Commission sought to be set aside, affirming such order of the Commission and dismissing the Complaint. Notice of appeal was filed in the United States District Court for the Northern District of Texas on October 13, 1967.

OPINIONS BELOW

The opinion of the District Court for the Northern District of Texas, Dallas Division, is reported in —— F. Supp. —— The opinion of the court, the concurring opinion of Judge W. M. Taylor, Jr., and the dissenting opinion of Judge Sarah T. Hughes are attached hereto as Appendices A, B and C. The order of the Court entered August 24, 1967 pursuant to decision of the three-judge court of August 7, 1967 is attached as Appendix D. The injunction pending appeal entered by the Court on September 29, 1967 is attached as Appendix E. The report and order of the Interstate Commerce Commission appealed from, of June 13, 1966, is reported in 102 M.C.C. 291 and is attached as Appendix F. The report and order of the Interstate Commerce Commission made after remand from the United States District Court for the Southern District of Texas, Houston Division, of March 15, 1961, is reported in 84 M.C.C. 562 and is attached hereto as Appendix G. The opinion of the District Court for the Southern District of Texas, Houston Division, in *T.S.C. Motor Freight Lines; et al. v. United States, et al.,* which was an appeal from the initial report and order of the Interstate Commerce Commission, of October 14, 1958, is reported in 186 F. Supp. 777 (affirmed *Herrin Transportation Co. v. United States,* 366 U.S. 419) and is attached hereto as Appendix H. The first report and order of the Interstate Commerce Commission of October 14, 1958, is reported in 77 M.C.C. 655, and is attached hereto as Appendix I. The order of the Interstate Commerce Commission of October 10, 1967 postponing the effective date of the Commission's order appealed from to December 1, 1967 is unreported and is attached hereto as Appendix J.

JURISDICTION

This suit was brought under 28 U.S.C. §§1336, 1398, 2284, 2321-2325, 49 U.S.C. §§17(9), 205(g) and (h) and 5 U.S.C. §1009 to set aside an order of the Interstate Commerce Commission, which was made in a separate proceeding, without notice or hearing, and which revokes and diminishes in part the authority previously granted by the Interstate Commerce Commission to appellant in a finally issued certificate. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. §§1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on difect appeal in this case: *United States v. Capital Transit Company,* 325 U.S. 357; *United States v. Detroit & Cleveland Navigation Company,* 326 U.S. 236; *United States v. Pierce Auto Freight Lines,* 327 U.S. 515.

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission has the power, acting on its own motion without notice or hearing, to modify a finally issued motor carrier certificate, materially restricting the authority of appellant, without compliance with the mandatory provisions of Sec. 212(a) of the Interstate Commerce Act?

2. Whether the action of the Interstate Commerce Commission in modifying appellant's certificate was (1) the correction of an inadvertent ministerial error or (2) a substantial change in a final decision consciously arrived at in 1961, pursuant to which a final certificate had been issued as ordered in such final decision?

3. Whether the 1961 certificate issued to appellant is contrary to the judgment and order of the District Court of the United States, Southern District of Texas, Houston Division, in *T.S.C. Motor Freight Lines, et al. v. United States, et al.*, 186 F. Supp. 777, on remand?

STATEMENT

The question presented is whether the action of the Commission in modifying a finally issued certificate of appellant, without notice and hearing, and in a collateral proceeding, falls within the scope of Section 212(a) of the Interstate Commerce Act.

A chronological statement of the various proceedings leading up to the order of the Commission involved herein appears below.

In 1954 Strickland made application for an additional route to New Orleans from Houston, filed in Docket No. MC 59680 Sub No. 117.

On October 14, 1958 the Commission handed down its decision finding

> "that the present and future public convenience and necessity require operation by applicant (Strickland) . . . between Houston, Texas and New Orleans, Louisiana, from Houston . . . to Kinder, Louisiana . . . to Baton Rouge, Louisiana . . . to New Orleans, and return over the same route, serving all intermediate points, but with service at Baton Rouge restricted to traffic moving to or from points west of the Louisiana-Texas State Line."

Action to set aside the certificate granted to Strickland was brought in the U. S. District Court for the Southern District of Texas, *T.S.C. Motor Freight*

Lines, et al. v. United States et al., 186 F. Supp. 795 (S.D. Texas 1960). The Court upheld the Commission in part but held that in certain respects the order should be modified. The Court stated at 793 "there was no showing of inadequate service from Orange and Beaumont, on the one hand, and Houston on the other" and held at 793 that the question of

> "local service between Beaumont-Orange and Houston of shipments destined for or originating from such points is obviously a question on which evidence on the need for that particular service must be adduced."

The Court further held that "so much of the certificate granting authority for new service between Beaumont-Orange and Houston must be set aside."

Footnote 42 at 794 at this point in the decision states

> "under our holding, except for Strickland's existing authority, the applicants will not be permitted to engage in the following transportation:
>
> "(1) Service from or through Houston destined to Beaumont or any point between Houston and Beaumont, or in the reverse direction.
>
> "(2) Service from or through Houston destined to Orange or any point between Houston and Orange, or in the reverse direction.
>
> "(3) Service from points east of Orange-Beaumont destined to any intermediate point between Orange-Beaumont or in the reverse direction. (This would not restrict, for example, a shipment from Baton Rouge to Orange or Beaumont or the reverse)."

The Court specifically stated in the footnote "we do not undertake to set this forth in terms having the precision of a certificate."

The only question considered in the opinion of the Court was the service between Houston-Beaumont-Orange, Baton Rouge and New Orleans, and intermediate points.

The Southern District Court was affirmed by the United States Supreme Court in *Herrin v. United States,* 366 U.S. 419 (1961).

On remand the Commission on March 15, 1961, specifically stated as follows:

> "We conclude that the findings in the prior report herein should be modified to conform to the decicision of the Court."

Without adducing further evidence, the previous order was modified so as to provide:

> "no service at intermediate points in Texas except as follows: Serving the intermediate points of Orange and Beaumont, Texas, restricted to traffic moving to or from points east of the Texas-Louisiana State line."

The Commission in amending the certificate stated,

> "In our judgment, the quoted language (in the footnote of the Court's opinion) forbids an authorization . . . to serve intermediate points in Texas other than Orange and Beaumont, and requires that authority to serve those points be restricted to traffic moving from or to points east of the Texas-Louisiana line."

Accordingly on June 26, 1961 the Sub No. 117 Certificate was issued in accordance with the order of the Commission.

It should be pointed out that the Court in eliminating

"service from points east of Orange-Beaumont

destined to any intermediate point between Orange-Beaumont and Houston or in the reverse direction."

did not state from what points the service would be allowed except to say in parenthesis that a shipment from Baton Rouge to Orange or Beaumont or the reverse would not be restricted. No petition for reconsideration of the report and order was filed by any protestant and such order became final upon the expiration of the time provided in the rules of practice of the Commission for the filing of a petition for reconsideration. Any contention that the modification of the authority as set forth in the report and order of March 15, 1961 did not in fact conform to the decree of the Court, could have been made by the filing of an appropriate petition for reconsideration within the time allowed by the rules of practice of the Commission.

On June 1, 1964 in Cause No. MC-C-4472, Central filed a complaint against Strickland Transportation Company alleging a violation of its certificate and praying for an order commanding the defendant to cease and desist from violations of the Act. It was contended that Strickland was engaged in providing unlawful transportation service to and from Beaumont and Orange, Texas and points in the commercial zones and terminal areas thereof on shipments to or through Houston, without moving such shipments physically across the state lines of Louisiana and Texas.

In this pleading Central prayed in the alternative that the certificate be modified, although the complaint states no cause of action in this regard and in fact makes no allegations with reference to such a change.

On the same date Central filed a petition asking that

Docket MC 59680 Sub No. 117 be reopened. The petition deals almost wholly with alleged violations of the certificate. Only in the prayer does Central ask the following:

> "an appropriate order be entered in connection with the foregoing complaint reopening Docket No. MC 59680 Sub No. 117 for the purpose of considering in the light of the subsequently developed facts and contentions hereinabove alleged (which contentions were alleged violations) "whether the terms, conditions and restrictions now contained in defendant Strickland's Certificate No. MC 59680 Sub No. 117 should be further modified and made more specific. . . ."

As noted in the prayer, the petition is based on facts which developed after the 1961 report of the Commission and there is no contention that the Commission failed to consciously follow the Court's opinion.

On June 11, 1964 Strickland filed a motion to strike or in the alternative to deny the petition to reopen and reform the certificate in Docket No. MC 59680 Sub No. 117. It was contended in the motion that since Rule 1.101(e) of the General Rules of Practice provides that a petition for reconsideration "must be filed within 30 days after the date of service of a decision or order," the petition must be rejected. Only good cause according to Strickland would excuse a timely motion for reconsideration, and no good cause had been alleged.

On July 13, 1964 Strickland filed a supplement to its motion to strike, or, in the alternative, to deny petition to reopen and reform certificate in Docket No. MC 59680 Sub No. 117 on the ground that

"the Commission has no jurisdiction to modify,

> revoke, or change respondent's certificate MC 59680 Sub 117 except under proceedings provided for under Section 212(a) of the Interstate Commerce Act."

On September 9, 1964 at a general session of the Interstate Commerce Commission "upon consideration of the records," the Commission entered an order in Cause No. MC 59680 Sub No. 117 in which it waived Rule 101(e) and accepted the petition of Central Freight Lines et al., for filing, overruled the motion of Strickland to strike the petition, and finally denied the petition "for the reason that no sufficient or proper cause appears for granting any of the relief therein sought." There was no hearing on the petition or motions.

With reference to the complaint of Central alleging a violation of its certificate, the Commission ordered Strickland to answer, and provided for statement of facts and argument by both parties.

In complainants' opening statement filed October 16, 1964 it was specifically stated

> "This proceeding does not involve any question of revoking or changing defendant Strickland's certificate. The only issue here is: What service is authorized by the certificate?"

On December 14, 1964 Strickland filed a motion to dismiss MC-C-4472 and on February 1, 1965 Central Freight Lines filed its reply to Strickland's motion to dismiss. The allegations in both pleadings deal with whether or not the operations of Strickland are within the scope of its authority. There is no contention that the amended certificate issued in 1961 was not in conformity with the order of the Court. Central's reply states

"The issue is a legal one, namely, whether such newly instituted operations by defendant Strickland are or are not in accordance with Certificate as issued in accordance with the Court's decision."

The allegations and argument dealt with the interpretation of the phrase "restricted to traffic moving to and from points east of the Texas-Louisiana line." This provision was contained in the original certificates of 1958 and was not commented on by the Court. It was likewise contained in the amended order of 1961.

On February 16, 1965 the matter was referred to a Hearing Examiner for recommendation of an appropriate order thereon. His report filed March 17, 1965 found that Strickland had been and "was engaged in certain transportation not authorized by its certificates in violation of Section 206 of the Interstate Commerce Act." A cease and desist order was recommended.

The Hearing Examiner interpreted the provision in the certificate "only points east of the Texas-Louisiana State line" as not including points north of the Texas-Arkansas State line, the most northerly point on the Texas-Louisiana State line being the intersection of the Texas-Arkansas State line. It was his opinion that the evidence was sufficient to warrant the conclusion that Strickland was conducting operations between Beaumont-Orange and points such as St. Louis, Memphis, Detroit, Milwaukee, and Chicago, which would not be possible under his interpretation of Strickland's certificate.

On May 3, 1965 Strickland filed exceptions to the report and recommended order of the Hearing Examiner, and on June 8, 1965 Central replied to Strickland's exceptions. These two pleadings deal largely

with the interpretation of Strickland's certificate, Strickland contending that the Hearing Examiner had incorrectly construed it, and Central arguing that the Hearing Examiner's recommended order simply clarified the certificate. For the first time Central raised the question of the ambiguity of the certificate, and need for clarification. In previous pleadings it was Central's contention that the certificate was clear and unambiguous and that Strickland was violating it. It now contends that there was need for clarification, and the Hearing Examiner's report is merely a clarification.

The recommendations of the Hearing Examiner were not adopted by the Commission. On June 13, 1966 in No. MC-C-4472 the Commission reversed the Examiner's finding that the operations being performed by Strickland were not outside the scope of the amended certificate. The complaint of Central which had alleged violation of the authority in its No. MC 59680 Sub No. 117 amended certificate was dismissed.

On the same date on its own motion, it reopened No. MC 59680 Sub No. 117 and without notice to the parties or a further hearing, it modified the certificate of Strickland to provide for service

> "between Houston, Texas and New Orleans, Louisiana, serving the intermediate points in Texas of Orange and Beaumont with service at points in the Orange-Beaumont, and Houston commercial zones restricted to the transportation of traffic moving to or from points on the below described route in Louisiana. . . ."

The amended certificate substituted the words "on the below described route in Louisiana" for the words

"east of the Texas-Louisiana State line" contained in the 1961 certificate. The Commission specially held its action to be in furtherance of the Court's mandate.

Strickland's petition for reconsideration of the order of June 13, 1966 was denied (making the order administratively final) by an order of the Commission served January 30, 1967. This action was filed February 20, 1967.

The first attack on the 1961 certificate was made by Central in 1964, long after the time for reconsideration by the Commission or appeal to the Court. This petition was denied by the Commission without a hearing, leaving only Cause No. MC-C-4472 which was a complaint against Strickland alleging violations of the 1961 order.

In the complaint case, it was conceded by Central that the 1961 order was valid and there was no attack on the order as such. The 1966 order materially reduced the scope of Strickland's certificate restricting its service at points in the Orange, Beaumont and Houston commercial zones to the transportation of traffic moving to or from points on a certain route in Louisiana, whereas, the 1961 order had authorized Strickland to transport shipments between Orange and Beaumont on the one hand, and on the other from points it is authorized to serve which are physically located east of the Texas-Louisiana line. The order under attack would prohibit Strickland from handling traffic unless it moved physically over the "below described route in Louisiana," whereas, the 1961 order permitted Strickland to handle traffic which moved from points north of Louisiana if they were east of the Texas-Louisiana State line or a northerly extension

thereof, on the one hand and on the other, Beaumont and Orange, without traversing any portion of Louisiana.

THE QUESTIONS PRESENTED ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION

The only manner in which the Commission may lawfully modify, revoke or change a certificate finally issued to a carrier is provided for under the mandatory provisions of Section 212(a) of the Interstate Commerce Act, 49 U.S.C. §312(a) which states:

> "*Certificates,* permits, and licenses *shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided.* Any such certificate, permit or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, *after notice and hearing,* be suspended, changed, or revoked, in whole or in part, *for willful failure to comply with any provision of this chapter, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license. . . .*" (Emphasis ours.)

The foregoing clearly prohibits modification or revocation of a certificate except for willful failure to comply with the law or with any lawful order, rule or regulation of the Commission, or with the terms, conditions or limitations in the certificate, and then only after notice and hearing.

The existence of a certificate creates a vested status

as a motor carrier which cannot be revoked or modified except by the mandatory provisions of Section 212(a) of the Act because such certificates are property of value and are entitled to constitutional protection. Such cannot be taken or diminished without regard to due process of law. See *Mover's Conference of America v. United States,* 205 F. Supp. 83 (where the Court said: ". . . Since it has been held that certificates to operate motor truck lines are property of value and are entitled to constitutional protection . . . (they) cannot be taken or diminished without regard to due process of law); *Rock Island Motor Transit Co. v. United States,* 90 F. Supp. 516, rev'd. on other grounds 340 U.S. 419; *Texas & Pac. Motor Transport Co. v. United States,* 87 F. Supp. 107, rev'd. on other grounds 340 U.S. 450; and *DeCamp Bus Lines v. United States,* 234 F. Supp. 196 (1963) at page 203:

> "It is true that Congress has delimited the Commission's power to suspend or revoke an outstanding carrier's certificate and that no certificate can be amended, modified, changed or revoked without the compliance with the provisions prescribed in Section 212 of the Act. *Castle v. Hayes Freight Lines,* 348 U.S. 61, 75 S. Ct. 191, 99 L. Ed. 68 (1954); *Seatrain Lines, Inc. v. United States,* 64 F. Supp. 156 (D. C.—Del. 1946), aff'd. 329 U. S. 424, 67 S. Ct. 435, 91 L. Ed. 296 (1947)."

The Commission does have certain powers of interpretation of certificates without resort to the mandatory provisions of Section 212(a) of the Act. However, the theory here is that by interpreting the Commission is merely clearing up ambiguities or resolving doubts in the certificate as to the scope of its authorization, and hence the certificate itself is neither increased nor

diminished thereby. Nevertheless, the provisions of Sec. 212(a), may not be circumvented under the guise of interpretation, construction or the resolving of ambiguities. See *Andrew G. Nelson, Inc. v. United States,* 355 U.S. 554; *Parkhill Truck Co. v. United States,* 240 F. Supp. 842; *Mover's Conference of America v. United States,* supra; *W. T. Mayfield Sons Trucking Co. v. United States,* 234 F. Supp. 655; *Watson Brothers Transportation Company, Inc. v. United States,* 132 F. Supp. 905, Affd. 350 U.S. 927; *Mitchell Bros. Truck Lines v. United States,* 225 F. Supp. 755.

In the instant case, however, the action of the Commission does not rest upon the matter of interpretation of Appellant's certificate. Rather the Commission fully agrees as to the proper interpretation of the certificate and wholly rejects the contentions of Central et al. in this area.

The Commission has remedial powers to correct certificates secured by fraud or misrepresentation or inadvertently issued because of ministerial or clerical error. The leading case in this area is *American Trucking Associations, Inc. v. Frisco Transportation Co.,* 358 U.S. 133. The court reasoned that Section 17(3) of the Act, 49 U.S.C. §17(3), gives similar power to the Commission that Rule 60(a) of the Federal Rules of Civil Procedure, 28 U.S.C., gives to the courts. Section 17(3) provides that:

> "The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice."

The procedural rule relates to correction of clerical errors in "judgments, orders or other parts of the rec-

ord and errors therein arising from oversight or omission. . . ."

The Supreme Court was very careful to limit this power to clerical errors, however, and expressly prohibited "mind changing" of the type being indulged in herein by the Commission. At page 146 of Chief Justice Warren's opinion for the majority, the court stated the rule as follows:

> *"Or course, the power to correct inadvertent ministerial errors may not be used as a guise for changing previous decisions because the wisdom of those decisions appears doubtful in the light of changing policies.* Such was the case in *United States v. Seatrain Lines,* supra, where it was apparent that the Commission had not reopened prior proceedings to correct a mistake in the issuance of a certificate but to execute a subsequently adopted policy. Cf. *Watson Bros. Transportation Co. v. United States,* 132 F. Supp. 905, D. C.-Neb., aff'd. 350 U.S. 927, 76 S. Ct. 302, 100 L. Ed. 810. *To allow the reopening of proceedings in such a case under the pretext of correction would undercut the obvious purpose* of §212 of the Interstate Commerce Act, 49 U.S.C.A. §312, which makes the issuance of a certificate the final step in the administrative process. . . ." (Emphasis ours.)

As explained in *Willey v. United States,* 245 F. Supp. 669, in *Frisco* the error which the Commission was attempting to correct was a clerical one, apparent on the face of the Commission orders, where the certificates as granted originally contained certain restrictions but as issued finally did not contain the restrictions. *The Commission's intent to restrict was clear* and it was clear that the error was a clerical one. At page 676 the Court noted the question determined

and the limitations of the rule in the *Frisco* case as follows:

> "While Section 212(a) of the Interstate Commerce Act (49 U.S.C.A. §312(a) purports to make the issuance of a certificate the final step in the administrative process for obtaining authority to transport commodities in interstate commerce, the Courts have found that the Commission has the power to revoke wholly or partially certificates which were issued as a result of inadvertence or mistake. The leading case in this area is *American Trucking Associations, Inc., et al. v. Frisco Transportation Co.*, 358 U.S. 133, 79 S. Ct. 170, 3 L. Ed. 2d 172. In *Frisco* the authority granted by the Commission originally contained certain limitations; however, when the certificate finally issued, the limitations were omitted. The Commission found that the omissions resulted from 'an inadvertent clerical error' and could thus be corrected. The United States Supreme Court agreed.
>
> "One of the questions the Supreme Court was called upon to decide in *Frisco* was whether the omission of certain restrictions from the certificate was due to a conscious policy choice on the part of the Commission or, as found by it, to error in the administrative process of fashioning the certificates. The holding in *Frisco* is premised on the theory that a tribunal has an inherent power to correct mistakes resulting from oversight or inadvertence. The Court found that the Commission does have such powers. *It pointed out, however, that this power extends only to judgments which have issued due to inadvertence or mistake and 'may not be used as a guise for changing previous decisions because the wisdom of those decisions appears doubtful in the light of changing policies.'*" (Emphasis ours.)

The cases are uniform that the controlling consid-

eration for modification predicated upon the *Frisco* rule is the question of the "intention" of the Commission. Where that intent is clear and the order issued conforms to that intention consciously arrived at, however erroneous on the merits, no collateral attack may be had on the certificate in question. In summary, then, a certificate which as issued is inconsistent with the clear intent of the Commission as disclosed by its report may be said to have been the product of inadvertence or clerical or ministerial error and may be corrected to make it agree with that intention. However, where the issuance of a certificate is consistent with the intention of the Commission, a different view is taken, and in these circumstances no change or modification can be made except as provided in Section 212(a) of the Act.

In the instant case it was for the considered discretion of the Commission on remand from the statutory court to frame the precise terms of the certificate to be issued. As stated most recently by the very same court in another proceeding, Civil Docket No. 13,645, styled *Shelby Biscuit Co. v. United States,* 255 F. Supp. 475 (DC-Tex.), (June 24, 1966):

> ". . . we do not undertake to blueprint the proceedings on remand. *This we leave initially to the considered discretion of the I.C.C.*" (Emphasis supplied.)

This the Commission in the instant case did by order dated March 15, 1961. The parties had an opportunity to file a petition for reconsideration of such order but did not do so, thereby accepting the Commission's interpretation and understanding of the Court's decree and the carrying out of the mandate by imposing the

restriction as set forth in the order of March 15, 1961. Hence, under the provisions of Section 212(a) of the Act and the cases construing it, with the issuance of the certificate on June 26, 1961, the proceeding ended and was final. There is absolutely no reason to suppose that the order of March 15, 1961, or the certificate issued June 26, 1961, pursuant thereto were other than framed precisely in accordance with the exact intention of the Commission consciously arrived at. Nowhere in the instant report does the Commission even attempt to state any grounds for fraud, misrepresentation, or clerical or ministerial error resulting in the advertent issuance of the certificate. The most that can be said of the Commission's rationale in the report as justification for its action is that it now desires to change its mind. For the Commission to do such a thing at this late date on such a basis would undercut the very foundations of the Act and the precedents with respect thereto concerning the finality of grants of authority to carriers and the injection of unreasonable uncertainty in the minds of the public and the industry as to the operating rights of carriers.

The foregoing is conclusively supported by the court in *T. I. McCormack Trucking Co., Inc. v. United States et al.*, 251 F. Supp. 526 (D.C.-New Jersey, 1966):

> "In order to afford the certainty and continuity essential for both carriers and the shipping public in such an extensively regulated industry, reliance on the language of an operating certificate must not go unrequited. Accordingly, absent a patent ambiguity on the fact of the document, the Commission will not permit reference to extraneous matters to show that the service apparently permitted by the terms of the certificate in fact exceeds the authority actually granted. *Andrew*

G. Nelson, Inc. v. United States, et al., 12 Fed. Car. cases ¶81, 178, 355 U.S. 554, 558 (1958)."

The order of March 15, 1961 was an order carrying out the mandate of the Court in the Commission's considered discretion and was considered by the Commission to be fully in accordance with the Commission's interpretation and understanding of the Court's decree consciously arrived at. The 1966 order in Docket No. MC 59680 Sub 117 was not the correction of a clerical error or caused by an inadvertent act of the Commission in 1961. The Commission in 1961 acted after careful examination of the Court's opinion and the certificate issued only after a determination that it was following the Court's opinion.

Under such circumstances Sec. 212(a) must be followed, notices issued and a hearing had before a change can be made in the certificate. A case in point is *Watson Transporation Co. v. United States,* 132 F. Supp. 905 (DC-1956), aff'd., 350 U.S. 927. At page 909 the District Court stated, "The only statutory authority for the suspension, change or revocation of a certificate by the Commission is contained in Sec. 212(a), Part II of the Interstate Commerce Act." In the *Watson* case an order of the Commission issued without notice and hearing restricting the authority of the carrier with reference to the type of commodities it was authorized to haul was held by the court to be void.

The Commission's subsequent modification of the certificate in 1966 was done without discussion by the parties as to whether it was in accord with the Court's opinion and without a hearing on the conditions and restrictions of any proposed change in the certificate. Such action is arbitrary and capricious and deprives

appellant of a valuable right without due process of law.

On the question whether or not the 1961 certificate is contrary to the judgment of the District Court for the Southern District on remand (Appendix H), the court discussed in some detail the evidence relating to the existing service between Houston and New Orleans and between Houston and the principal intermediate points. With reference to the service from Orange and Beaumont, on the one hand, and Houston, on the other, the Court found that there was no showing of inadequate service in order to receive a grant of authority to Strickland and for such *local* service, . . . "evidence on the need for that particular service must be adduced." (page 793). The Court then stated at page 794 "So much of the certificate granting authority for *new* service between Beaumont-Orange and Houston must be set aside."

The concluding paragraph of the opinion states that at page 795, "Accordingly, the order is affirmed in part and set aside in part. Insofar as the order is set aside the matter is remanded to the Commission for further consistent proceeding." Footnote 42 deals only with the restrictions on the service from and through Houston destined to Beaumont or Orange or to intermediate points between Orange-Beaumont and Houston and service from points east of Orange-Beaumont destined to any intermediate points between Orange-Beaumont or in the reverse direction.

There was no discussion in the entire opinion with regard to the remainder of the order. Therefore, it would appear that the only part of the Commission's order which it was directed to change was with regard

to *new local* service between Houston and Beaumont-Orange. The remainder of the certificate was to be determined by the Commission and was not subject to restrictions by the Court. The Commission did give effect to the finding of the Court that the order of the Commission was supported for authorizing the tacking of the certificate with other certificates. On page 792 of its decision the court states "The applicants' proposed service contemplates service between all points which they now serve, on the one hand, and, on the other, New Orleans and points between Houston and New Orleans," and on page 793 of the decision

> "The 'tacking' argument would apply to Strickland's Houston to Beaumont service. Insofar as points west or north of Houston such as San Antonio, Fort Worth, Dallas, St. Louis, Chicago, Strickland and Southern Plaza were previously authorized to serve, the new authority is properly regarded as 'tacking.' The Commission's order is adequate as to evidence and findings to sustain the order with respect to such transportation."

The Commission gave force to this finding of the Court by the issuance of the certificate in the manner it did in 1961. Under the certificate as issued, appellant was proscribed from performing local service between Beamont-Orange and Houston and that is the only authority set aside by the Court. Under the certificate as issued, appellant could not pick up shipments in Orange or Beaumont going to Houston for delivery or to give to connecting carriers nor could appellant pick up a shipment from a shipper or a connecting carrier at Houston and haul to Beaumont or Orange. Since the 1961 certificate authorizes no service proscribed by the Court's mandate it is not contrary to the Court's order.

The Commission had authority to amend the certificate in question in 1961 because of the remand order for "consistent proceedings." Such authority overcame Sec. 212(a) of requirements at that time but to say that some years later in a collateral proceeding, such authority would again overcome Section 212(a) is not correct. The order of March 15, 1961 amending the certificate was according to the Commission's interpretation of what it thought the mandate of the Court meant, and was consciously arrived at. The issuance of a certificate by the Commission was "the final step in the administrative process," *American Trucking Association, Inc. v. U. S.*, 358 U.S. 133.

Appellant is entitled to have the orders in MC-C-4472 embracing MC 59680 Sub 117 annulled, enjoined, canceled and set aside and to permanently enjoin appelles from giving effect thereto.

Respectfully submitted,

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PROOF OF SERVICE

I, Ewell H. Muse, Jr., one of the attorneys for Strickland Transportation Co., Inc., Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day of

November, 1967, I served copies of the foregoing Jurisdictional Statement on the several parties hereto as follows:

(1) On the United States of America by mailing copies, in duly addressed envelopes with air mail postage prepaid to Ralph S. Spritzer, Acting Solicitor General, Department of Justice, Washington, D. C. 20530; Mr. John H. D. Wigger, Attorney, Department of Justice, Washington, D. C. 20530; Mr. Donald F. Turner, Assistant Attorney General, Department of Justice, Washington, D. C. 20530; and Mr. Melvin M. Diggs, United States Attorney, United States Court House, Fort Worth, Texas.

(2) On the Interstate Commerce Commission by mailing copies, in duly addressed envelopes with air mail postage prepaid, to Mr. Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington, D. C. 20423, and to Mr. Nahum Litt, Attorney, Interstate Commerce Commission, Washington, D. C. 20423.

(3) On Central Freight Lines, Inc. and Roadway Express, Inc., by mailing copy, in a duly addressed envelope with first class postage prepaid to Mr. Phillip Robinson, The 904 Lavaca Building, Austin, Texas 78701.

(4) On Herrin Transportation Company, Inc., by mailing copy, in a duly addressed envelope with first class postage prepaid to Mr. Leroy Hallman, 4555 First National Bank Building, Dallas, Texas 75202.

(5) On Missouri Pacific Railroad Company and Southern Pacific Company by mailing a copy, in a duly addressed envelope with first class postage pre-

paid, to Mr. Charles L. Ford, Jr., General Attorney, Texas Railroad Association, P. O. Box 717, Austin, Texas 78767.

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APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

CIVIL ACTION NO. 3-1932

STRICKLAND TRANSPORTATION CO., INC.
Plaintiff

vs.

THE UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION
Defendants

OPINION

Before GOLDBERG, Circuit Judge, and HUGHES and TAYLOR, District Judges.

GOLDBERG, Circuit Judge:

This case was brought by Strickland Transportation Company against the United States of America and the Interstate Commerce Commission to "revise, enjoin, set aside, annul and suspend in whole or in part, a decision and order" of the Commission, which Strickland alleges "revokes and diminishes in part the authority previously granted" by the Commission to Strickland.

Central Freight Lines, Inc., Herrin Transportation

Company, Roadway Express, Inc., Missouri-Pacific Railroad Company, and Southern Pacific Company intervened, seeking to uphold the decision of the Commission.

In order to understand the issue in this case, it is necessary to review the various proceedings leading up to the order of the Commission involved herein.

In 1954, Strickland made application for a certificate of public convenience and necessity to transport general commodities between Houston, Texas, and New Orleans, Louisiana, over certain specified routes, serving all intermediate points. (Docket No. MC-59680 [Sub. No. 117]). After extended proceedings, the Commission on October 14, 1958, handed down its decision, finding in part

> "that the present and future public convenience and necessity require operation by applicant (Strickland) . . . between Houston, Tex., and New Orleans, La., from Houston . . . to Kinder, La., . . . to Baton Rouge, La., . . . to New Orleans, and return over the same route, *serving all intermediate points,* but with service at Baton Rouge restricted to traffic moving to or from points west of the Louiana-Texas State line." (Emphasis added.)

Pursuant to this order, Strickland was granted a certificate authorizing such unrestricted service at all intermediate points in Texas.

Action to set aside this certificate was instituted by several of the protesting carriers, including intervenors, in the United States District Court for the Southern District of Texas at Houston. On August 1, 1960, in *T.S.C. Motor Freight Lines, et al., v. United States, et al.,* 186 F.Supp. 777, the statutory three-judge court

affirmed the Commission's order in part but, as significant here, found that "there was no showing of inadequate service from Orange and Beaumont, on the "one hand, and Houston on the other," Id. at 793, and set aside that part of the certificate authorizing new service between Beaumont-Orange and Houston, and points intermediate thereto. Footnote 42 at this point indicated with some specificity in which particulars, the service authorized by the Commission's certificate should be prohibited:

> "As the case has to be remanded to the Commission with respect to this phase, we do not undertake to set this forth in terms having the precision of a certificate. But under our holding, except for Strickland's existing authority, the applicant's will not be permitted to engage in the following transportation:
>
> (1) Service from or through Houston destined to Beaumont or any point between Houston and Beaumont, or in the reverse direction,
>
> (2) Service from or through Houston destined to Orange or any point between Houston and Orange, or in the reverse direction,
>
> (3) Service from points east of Orange-Beaumont destined to any *intermediate point between* Orange-Beaumont and Houston, or in the reverse direction. (This would not restrict, for example, a shipment from Baton Rouge to Orange or Beaumont, or the reverse.)" 186 F.Supp. at 794.

The Supreme Court affirmed *per curiam* in *Herrin Transportation Co., et al. v. United States, et al.*, 1961, 366 U.S. 419, 81 S. Ct. 1356, 6 L.Ed. 2d 387.

By its order dated March 15, 1961, the Commission concluded "that the findings in the prior report herein

should be modified to conform to the decree of the court." 84 M.C.C. 562, 563. Accordingly, the certificate previously issued to Strickland was modified so as to authorize Strickland to transport the commodities indicated, between the termini and over the routes specified in its present certificate, with service at intermediate points in Louisiana as specified, but with no service at intermediate points in Texas except as follows:

> "Serving the intermediate points of Orange and Beaumont, Tex., restricted to traffic moving to or from points east of the Texas-Louisiana State line." Ibid.

On June 1, 1964, in Cause No. MC - C-4472, the intervening defendants and the Commission filed a joint complaint, embracing a petition to reopen and alternatively to reform the Sub. 117 Certificate, alleging that Strickland was engaged in providing an unlawful transportation service to and from Beaumont and Orange, Texas, and points in the commercial zones and terminal areas thereof on shipments to or through Houston, without moving such shipments physically across the Texas-Louisiana State line. An example of the traffic which Strickland admittedly transports under the restriction and which is at issue, would be a movement from St. Louis, Missouri, through Houston to Beaumont-Orange, or in the reverse. Intervenors, on the same date, filed a separate petition to reopen Docket No. MC-59680 (Sub. No. 117) and reform the certificate. The gist of the complaint was that either the language used by the Commission in following the district court's remand properly proscribed service through Houston, in which case Strickland was violating the certificate, or if such language did not explicit-

ly proscribe such operations, it was ambiguous in view of the Commission's duty to follow the order on remand, in which case the certificate should be further modified and made more specific so as to make it comply with the opinion, order, and mandate of the Court.

The proceeding was set for modified procedures by order of the Commission, dated June 10, 1965, and both intervenors and Strickland filed verified statements, together with exhibits. On February 16, 1965, the matter was referred to a Hearing Examiner for recommendation of an appropriate order. His report, filed March 17, 1965, found that Strickland's Sub. No. 117 certificate proscribed the operations Strickland was conducting and recommended issuance of a cease and desist order. He interpreted the modified provision "only points east of the Texas-Louisiana State line" as limiting Strickland to the transportation of traffic originating at or destined to Orange and Beaumont, which moved to or from one of its authorized points of service in Louisiana only. He, therefore, concluded that the transportation by Strickland of commodities moving to or from points east of a northerly extension of the Texas-Louisiana State line (e.g., St. Louis, Memphis, Detroit, Milwaukee, and Chicago) but which did not move through an authorized point on the Louisiana route was in violation of the certificate authority.

The majority of the Commission, in its report of June 13, 1966, reversed the examiner, finding that the operations being performed by Strickland were not outside the scope of the amended certificate. It further found, however, that the certificated authority did not conform to the district court's decree as had been intended and that ". . . we are bound by the opinion of

the court and any broader grant of authority made contrary thereto, however unintended, would fail to meet its mandate or statutory requirements." 102 M.C.C. 291, 297. The Commission specifically found that its March 15, 1961 order was not consistent with the district court's remand to restrict Strickland's operations from or through Houston destined to Beaumont and Orange or in the reverse, a service for which the court found no need had been established. In correcting the error, the Commission concluded that it had no alternative but to issue a second amended certificate reflecting an appropriate modification in conformance with the court's mandate, which it did. The second modification after remand provided for service

> "between Houston, Tex., and New Orleans, La., serving the intermediate points in Texas of Orange and Beaumont, with service at points in the Orange, Beaumont, and Houston commercial zones restricted to the transportation of traffic moving to or from points on the below described route in Louisiana : . . ." 102 M.C.C. at 302.

Strickland's petition for reconsideration was denied, and the instant action was filed on February 20, 1967.

The singular issue before this court is whether by its 1961 order the Commission acted, for whatever reason, in a manner inconsistent with the mandate of the district court so that it might later modify the previously issued certificate to conform to the terms of the district court remand without having to comply with the hearing provisions of Sec. 212 (a) of the Interstate Commerce Act.[1] We believe the Commission was justified

[1]Sec. 212 (a), Interstate Commerce Act, 49 U.S.C. 312 (a) provides in pertinent part:

in so doing and would have been recreant had it done otherwise.

While it is true that the district court did not attempt to set forth its order "in terms having the precision of a certificate," it could not have been more explicit than it was in footnote 42, quoted supra, that it intended to restrict Strickland's service to and from Orange and Beaumont through Houston. The mandate of the district court was to deny Strickland any new authority to service Beaumont-Orange and points in between Beaumont-Orange and Houston (e.g. Liberty, Dayton, and Nome). On remand from the district court, the Commission announced that its findings "should be modified to conform to the decree of the court." The amended certificate, however, permitted and proscribed operations between Orange, Beaumont and Houston; and when this was brought to the attention of the Commission in the present action, the order was properly amended again. The question, then, of whether an error was made by the Commission on remand must be answered in the affirmative. We are confident that the Commission expressly intended to follow the mandate of the court as expressed in footnote 42. The Commission did not conceive or foresee this mis-

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"(a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may * * * after notice and hearing, be suspended, changed, or revoked in whole or in part, for willful failure to comply with any provision of this chapter, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: * * *"

construction of its order and should not be powerless to correct Strickland's legalistically imaginative but legally unwarranted construction.

When a reviewing court has set aside administrative action found not supported by the evidence and has remanded the matter for further consistent proceedings, the Commission is without power to act except in accord with the court's mandate. *Inland Steel Co. v. United States,* 1939, 306 U. S. 153, 83 L.Ed. 557, —— S. Ct. ——. By inadvertently fashioning a certificate inconsistent with the court's mandate, the Commission became bound to amend the certificate to conform to the mandate, whether it took two or two dozen later efforts to properly effectuate the court's order. Courts are not procedural pawns whose opinions can be frustrated through administrative misadventure. The Commission so comprehends and we should not confuse that comprehension. Here the agency seeks to conform to a court's opinion and all available accommodations should be summoned to fulfill optimum conformity.

It is not pride or arrogance that makes it important that echelons, tiers, and hierarchies of courts be more than tables of organization. Our judicial system is premised on tiered decisions. We are not dealing with the trivia of a pecking order but are concerned that the words of a higher court command the respect due them.

A tribunal has an inherent power to correct mistakes resulting from oversight or inadvertence. *American Trucking Association v. Frisco Transportation,* 1958, 358 U.S. 133, 3 L.Ed. 2d 172, 79 S. Ct. 170. In *Frisco,* the Supreme Court held that the Comission had the

power to correct a certificate which originally contained certain limitations but, as a result of an inadvertent clerical error, was issued without such limitations. The Court emphasized, however, that this power extends only to reopening prior proceedings to correct a mistake and not to modifying a certificate to execute a policy change or newly developed policies. Chief Justice Warren, speaking for the court, pointed out that the Commission's enabling act provides that:

> " 'The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice.' This broad enabling statute, in our opinion, authorized the correction of inadvertent ministerial errors. To hold otherwise would be to say that once an error has occurred the Commission is powerless to take remedial steps. This would not, as Congress provided, 'best conduce to the ends of justice.' " 358 U. S. at 145, 2 L.Ed. 2d at 181, 79 S. Ct. at ——.

In the recent case of *Willey v. United States,* E. D. Ill., 1965, 245 F. Supp. 669, the Court was faced with a similar situation in that the Commission's certificate granted broader authority than the evidence justified. Stating that "the case should be considered as one in which the Commission does have the power to revoke or modify a certificate," id. at 677, the court held that although the certificate is the final step in the administrative process, the Commission has power to revoke wholly or partially, without resort to Sec. 212 (a), certificates issued as a result of inadvertence or mistake. The distinction, as viewed by the Illinois court, is one between conscious policy choice and, as in Frisco, "error in the administrative process of fashioning a cer-

tificate." Id. at 676. In the instant case, in view of the Commission's express desire to conform to a clear mandate from the court and in view of its failure at first to effectively accomplish this, we hold that the Commission had the later power, upon learning of the error, to reform Strickland's certificate.

This problem was linguistic or semantic: whether the Commission had properly transcribed footnote 42 as a matter of words. No new theories were invoked, and no testimony or other evidence was required to confront the error. Further, Strickland and all other interested parties had full notice that the confrontation was to be undertaken by the Commission, and all parties appeared. They knew that the hearings would concern footnote 42 of the district court opinion, which was all they needed to know and all that the Commission dealt with. Section 212 (a) should be summoned for a four-alarm fire, but not when one whiff from a fire extinguisher can quell the blaze.

The order of the Commission is hereby approved.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

CIVIL ACTION NO. 3-1932

STRICKLAND TRANSPORTATION CO., INC.,
Plaintiff

vs.

THE UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION,
Defendants

OPINION

Before GOLDBERG, Circuit Judge, and HUGHES and TAYLOR, District Judges.

TAYLOR, District Judge:

I concur in Judge Goldberg's opinion in this case. Plaintiff Strickland's transportation service between Houston, Texas and New Orleans, Louisiana, and to and from Beaumont and Orange, Texas, has been in controversy and litigation since October 14, 1958. Strickland has participated in all proceedings and has been fully aware of the controversy in regard to its transportation authority under the Certificates granted to it by the Interstate Commerce Commission. Strickland was as well aware of the judgment of the District Court for the Southern District of Texas and the lim-

itations set forth therein as was any other party to the litigation. It is true that there was no appeal from the Commission's 1961 Order after remand by the District Court. However, Strickland made no attempt to take advantage of the authority granted by the Commission's 1961 Order and Certificate issued thereunder until 1964 when Central asked for a modification of that Certificate. While *Sims Motor Transport Lines, Inc. v. U.S.*, 183 F. Supp. 113, was an investigation proceeding, some of the language used therein is pertinent here, as follows:

> "* * * [T]he orders plaintiff asks us to set aside take no rights from it, but merely interpret what rights it had from the beginning. It is apparent from the record that defendant Commission has not sought to diminish or modify, under the guise of interpretative action, or otherwise, [the District Court's opinion] but has rather endeavored to provide a reasonable and fair construction of the same. Since we are here concerned with the review of an interpretation proceeding, neither Section 312 (a), nor Watson Bros. Transportation Co. v. United States, D.C., 132 F. Supp. 905, are applicable."

183 F. Supp. 113, at 117.

Paraphrasing further from that Opinion, there is no evidence in any of the basic proceedings which have been reviewed which could support a finding that when the various certificates or any of them were issued it was contemplated or intended that Strickland was being granted authority denied by the District Court for the Southern District of Texas.

It is my opinion that Section 212(a) is not applicable here.

W. M. TAYLOR, JR.
United States District Judge

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

CIVIL ACTION NO. 3-1932

STRICKLAND TRANSPORTATION CO., INC.,
Plaintiff

vs.

THE UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION,
Defendants

DISSENTING OPINION

Before GOLDBERG, Circuit Judge, and TAYLOR and HUGHES, District Judges.

HUGHES, District Judge:

This case was brought by Strickland Transportation Company, hereinafter called Strickland, against the United States of America and the Interstate Commerce Commission, hereinafter called Commission, to "revise, enjoin, set aside, annul and suspend in whole or in part, a decision and order of the" Commission, which Strickland alleges "revokes and diminishes in part the authority previously granted"[2] by the Commission to Strickland.

[1]Complaint, p. 1.
[2]Complaint, p. 6.

Central Freight Lines, Inc., Herrin Transportation Company, Roadway Express, Inc., Missouri-Pacific Railroad Company, and Southern Pacific Company intervened seeking to uphold the decision of the Commission. All intervenors will hereafter be referred to as Central.

In order to understand the issue in this case, it is necessary to review the various proceedings leading up to the order of the Commission involved herein.

In 1954 Strickland made application for an additional route to New Orleans from Houston, filed in Docket No. MC-59680 (Sub. No. 117).

On October 14, 1958 the Commission handed down its decision finding

> "that the present and future public convenience and necessity require operation by applicant (Strickland) . . . between Houston, Texas and New Orleans, Louisiana, from Houston . . . to Kinder, Louisiana . . . to Baton Rouge, Louisiana . . . to New Orleans, and return over the same route, serving all intermediate points, but with service at Baton Rouge restricted to traffic moving to or from points west of the Louisiana-Texas State line."[1]

Action to set aside the certificate granted to Strickland was brought in the U. S. District Court for the Southern District of Texas. *T.S.C. Motor Freight Lines, et al. v. United States et al.*, 186 F. Supp. 795 (S.D. Texas 1960). The Court upheld the Commission in part but held that in certain respects the order should be modified. The Court stated at 793 "there was no showing of inadequate service from Orange and

[1]Exhibit B, p. 669, Complaint.

Beaumont, on the one hand, and Houston on the other" and held at 793 that the question of

> "local service between Beaumont-Orange and Houston of shipments destined for or originating from such points is obviously a question on which evidence on the need for that particular service must be adduced."

The Court further held that "so much of the certificate granting authority for new service between Beaumont-Orange and Houston must be set aside."

Footnote 42 at 794 at this point in the decision states

> "under our holding, except for Strickland's existing authority, the applicants will not be permitted to engage in the following transportation:
>
> "(1) Service from or through Houston destined to Beaumont or any point between Houston and Beaumont, or in the reverse direction.
>
> "(2) Service from or through Houston destined to Orange or any point between Houston and Orange, or in the reverse direction.
>
> "(3) Service from points east of Orange-Beaumont destined to any intermediate point between Orange-Beaumont or in the reverse direction. (This would not restrict, for example, a shipment from Baton Rouge to Orange or Beaumont or the reverse.)"

The Court specifically stated in the footnote "we do not undertake to set this forth in terms having the precision of a certificate."

The only question considered in the opinion of the Court was the service between Houston; Beaumont-Orange, Baton Rouge and New Orleans, and intermediate points.

The Southern District Court was affirmed by the United States Supreme Court, 366 U.S. 419 (1961). On remand the Commission on March 15, 1961 specifically stated as follows:

> "We conclude that the findings in the prior report herein should be modified to conform to the decision of the Court."[4]

Without adducing further evidence, the previous order was modified so as to provide:

> "no service at intermediate points in Texas except as follows: Serving the intermediate points of Orange and Beaumont, Texas, restricted to traffic moving to or from points east of the Texas-Louisiana State line."[5]

The Commission in amending the certificate stated,

> "In our judgment, the quoted language (in the footnote of the Court's opinion) forbids an authorization . . . to serve intermediate points in Texas other than Orange and Beaumont, and requires that authority to serve those points be restricted to traffic moving from or to points east of the Texas-Louisiana line."[6]

Accordingly on June 26, 1961 the Sub. No. 117 Certificate was issued in accordance with the order of the Commission.[7]

It should be pointed out that the Court in eliminating

> "service from points east of Orange-Beaumont destined to any intermediate point between

[4]Exhibit C, p. 563, Complaint.
[5]Exhibit C, p. 563, Complaint.
[6]Exhibit C, p. 563, Complaint.
[7]Exhibit D, Complaint.

Orange-Beaumont and Houston or in the reverse direction'"

did not state from what points the service would be allowed except to say in parenthesis that a shipment from Baton Rouge to Orange or Beaumont or the reverse would not be restricted. No petition for reconsideration of the report and order was filed by any protestant and such order became final upon the expiration of the time provided in the rules of practice of the Commission for the filing of a petition for reconsideration. Any contention that the modification of the authority as set forth in the report and order of March 15, 1961 did not in fact conform to the decree of the Court, could have been made by the filing of an appropriate petition for reconsideration within the time allowed by the rules of practice of the Commission.

On June 1, 1964 in Cause No. MC-4472, Central filed a complaint against Strickland Transportation Company alleging a violation of its certificate and praying for an order commanding the defendant to cease and desist from violations of the Act. It was contended that Strickland was engaged in providing unlawful transportation service to and from Beaumont and Orange, Texas and points in the commercial zones and terminal areas thereof on shipments to or through Houston, without moving such shipments physically across the state lines of Louisiana and Texas.

In this pleading Central prayed in the alternative that the certificate be modified, although the complaint states no cause of action in this regard and in fact makes no allegations with reference to such a change.

'*T.S.C. Motor Freight Lines v. U.S.*, footnote 42.

On the same date Central filed a petition asking that Docket MC-59680 (Sub. No. 117) be reopened. The petition deals almost wholly with alleged violations of the certificate. Only in the prayer does Central ask the following:

> "an appropriate order be entered in connection with the foregoing complaint reopening Docket No. 59680 (Sub. No. 117) for the purpose of considering in the light of the subsequently developed facts and contentions hereinabove alleged (which contentions were alleged notations) "whether the terms, conditions and restrictions now contained in defendant Strickland's Certificate No. MC-59680 (Sub. No. 117) should be further modified and made more specific . . ."

As noted in the prayer, the petition is based on facts which developed after the 1961 report of the Commission and there is no contention that the Commission failed to consciously follow the Court's opinion.

On June 11, 1964 Strickland filed a motion to strike or in the alternative to deny the petition to reopen and reform the certificate in Docket No. MC-59680, Sub. No. 117. It was contended in the motion that since Rule 1.101(e) of the General Rules of Practice provide that a petition for reconsideration "must be filed within 30 days after the date of service of a decision or order," the petition must be rejected. Only good cause according to Strickland would excuse a timely motion for reconsideration, and no good cause had been alleged.

On July 13, 1964 Strickland filed a supplement to its motion to strike, or, in the alternative, to deny petition to reopen and reform certificate in Docket No. MC-59680, Sub. No. 117 on the ground that

"the Commission has no jurisdiction to modify, revoke, or change respondent's certificate MC-59680, Sub. 117 except under proceedings provided for under Section 212(a) of the Interstate Commerce Act."*

On September 9, 1964 at a general session of the Interstate Commerce Commission "upon consideration of the record," the Commission entered an order in Cause No. MC-59680 (Sub. No. 117) in which it waived Rule 101(e) and accepted the petition of Central Freight Lines et al. for filing, overruled the motion of Strickland to strike the petition, and finally denied the petition "for the reason that no sufficient or proper cause appears for granting any of the relief therein sought." There was no hearing on the petition or motions.

With reference to the complaint of Central alleging a violation of its certificate, the Commission ordered Strickland to answer, and provided for statement of facts and argument by both parties.

In complainants' opening statement filed October 16, 1964 it was specifically stated

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*Section 212(a) of the Interstate Commerce Act, 49 U.S.C. 312(a), provides in pertinent part:

"Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: * * *"

"This proceeding does not involve any question of revoking or changing defendant Strickland's certificate. The only issue here is: What service is authorized by the certificate?"

On December 14, 1964 Strickland filed a motion to dismiss MC-C-4472 and on February 1, 1965 Central Freight Lines filed its reply to Strickland's motion to dismiss. The allegations in both pleadings deal with whether or not the operations of Strickland are within the scope of its authority. There is no contention that the amended certificate issued in 1961 was not in conformity with the order of the Court. Central's reply states

"The issue is a legal one, namely, whether such newly instituted operations by defendant Strickland are or are not 'in accordance with Certificate as issued in accordance with the Court's decision' ".[10]

The allegations and argument dealt with the interpretation of the phrase "restricted to traffic moving to and from points east of the Texas-Louisiana line." This provision was contained in the original certificate of 1958 and was not commented on by the Court. It was likewise contained in the amended order of 1961.

On February 16, 1965 the matter was referred to a Hearing Examiner for recommendation of an appropriate order thereon. His report filed March 17, 1965 found that Strickland had been and "was engaged in certain transportation not authorized by its certificates in violation of Section 206 of the Interstate Com-

[9]Opening Statement of Central, p. 9.
[10]Strickland's Motion, p. 2.

merce Act.'"[11] A cease and desist order was recommended.

The Hearing Examiner interpreted the provision in the certificate "only points east of the Texas-Louisiana State line" as not including points north of the Texas-Arkansas State line, the most northerly point on the Texas-Louisiana State line being the intersection of the Texas-Arkansas State line. It was his opinion that the evidence was sufficient to warrant the conclusion that Strickland was conducting operations between Beaumont-Orange and points such as St. Louis, Memphis, Detroit, Milwaukee, and Chicago which would not be possible under his interpretation of Strickland's certificate.

On May 3, 1965 Strickland filed exceptions to the report and recommended order of the Hearing Examiner, and on June 8, 1965 Central replied to Strickland's exceptions. These two pleadings deal largely with the interpretation of Strickland's certificate, Strickland contending that the Hearing Examiner had incorrectly construed it, and Central arguing that the Hearing Examiner's recommended order simply clarified the certificate. For the first time Central raised the question of the ambiguity of the certificate, and need for clarification. In previous pleadings it was Central's contention that the certificate was clear and unambiguous and that Strickland was violating it. It now contends that there was need for clarification, and the Hearing Examiner's report is merely a clarification.

The recommendations of the Hearing Examiner were not adopted by the Commission. On June 13, 1966 in

[11]Hearing Examiner's Report filed March 17, 1965, p. 10.

No. MC-C-4472 the Commission reversed the Examiner's finding that the operations being performed by Strickland were not outside the scope of the amended certificate. The complaint of Central which had alleged violation of the authority in its No. MC-59680 (Sub. No. 117) amended certificate was dismissed.

On the same date on its own motion, it reopened No. MC-59680 (Sub No. 117) and without notice to the parties or a further hearing, it modified the certificate of Stickland to provide for service

> "between Houston, Texas and New Orleans, Louisiana, serving the intermediate points in Texas of Orange and Beaumont with service at points in the Orange, Beaumont, and Houston commercial zones restricted to the transportation of traffic moving to or from points on the below described route in Louisiana, . . ."[12]

The amended certificate substituted the words "on the below described route in Louisiana" for the words "east of the Texas-Louisiana State line" contained in the 1961 certificate. The Commission specifically held its action to be in furtherance of the Court's mandate.

Strickland's petition for reconsideration of the order of June 13, 1966 was denied (making the order administratively final) by an order of the Commission served January 30, 1967. The action of this Court was filed February 20, 1967.

The only question in this case is whether the action of the Commission in 1966 amending the certificate of Strickland falls within the scope of Section 212(a) of

[12]Form of amended certificate to be issued attached to Central's complaint.

the Interstate Commerce Act. It is the contention of the Commission that in modifying the certificate it was merely making a second correction in a certificate issued subsequent to a remand by the Court in conformance with that remand.

It is my opinion that the action of the Commission falls within the scope of Section 212(a) and that notice and a hearing were required before Strickland's certificate could be changed.

The first attack on the 1961 certificate was made by Central in 1964, long after the time for reconsideration by the Commission or appeal to the Court. This petition was denied by the Commission without a hearing, leaving only Cause No. MC-C-4472 which was a complaint against Strickland alleging violations of the 1961 order.

In the hearing on the complaint, it was conceded by Central that the 1961 order was valid and there was no attack on the order as such. The 1966 order materially reduced the scope of Strickland's certificate restricting its service at points in the Orange, Beaumont and Houston commercial zones to the transportation of traffic moving to or from points on a certain route in Louisiana, whereas, the 1961 order had authorized Strickland to transport shipments between Orange and Beaumont on the one hand and on the other from points it is authorized to serve which are physically located east of the Texas-Louisiana line. The order under attack would prohibit Strickland from handling traffic unless it moved physically over the "below described route in Louisiana," whereas, the 1961 order permitted Strickland to handle traffic which moved from points north of Louisiana if they were east of the Texas-Louis-

iana State line or a northerly extension thereof, on the one hand and on the other, Beaumont and Orange, without traversing any portion of Louisiana.

The case of *American Trucking Co. v. Frisco Co.*, 358 U.S. 133 (1958) is a leading case on the question of whether the Commission may change its order without complying with the provisions of Section 212(a).

In it the American Trucking Company made application to purchase the operating rights of several carriers. The hearing examiner recommended approval "subject to such further limitations, restrictions or modifications as the Commission may hereafter impose . . ." The Commission adopted the Examiner's recommendations including the above quoted condition. Thereafter, compliance orders were issued which failed to include the condition adopted by the Commission, nor did the certificates issued to American contain such condition. In a subsequent proceeding it was shown that certificates are prepared by a staff section of the Commission which

> "has no discretion to alter anything contained in the reports and is charged with the sole responsibility of transposing the Commission findings into certificate form. . . ."

Division 5 to whom the case had been referred reasoned that "the staff section of certificates obviously had made an inadvertent error in transposing the relevant findings." The full Commission agreed with Division 5 and the corrections ordered in the certificates.

The Supreme Court upheld the decision of the Commission. The question the Court said at p. 142 was

> "whether the omission of the restriction from the

certificates was due to a conscious policy choice on the part of the Commission or, as found by it, to error in the administrative process of fashioning the certificates."

The Court at p. 143 found

"there is nothing in the record . . . to indicate that the Commission . . . instructed the staff to delete the restrictions and increase the scope of appellee's operation. This factor militates strongly in favor of the Commission's conclusion that the reservations inadvertently were omitted . . ."

From a review of all the facts, the Court concluded that the Commission was correct. Such certificates issued due to inadvertence could be modified by the Commission without resorting to Section 212(a).

The Court continued at p. 146

"Of course, the power to correct inadvertent ministerial errors may not be used as a guise for changing previous decisions because the wisdom of those decisions appears doubtful in the light of changing policies . . . to allow the reopening of proceedings in such a case under the pretext of correction would undercut the obvious purpose of Section 212 of the Interstate Commerce Act . . . which makes the issuance of a certificate the final step in the administrative process. But nothing in that section prohibits the correction of inadvertent errors. Here, as we have shown, the certificates issued to appellee mistakenly omitted an intended provision, and the Commission's subsequent action was not the execution of a newly adopted policy but, as it found in a proceeding in which appellants participated after notice, merely the correction of the inadvertence."

In the case before us the order of 1961 following re-

mand cannot be said to have been an inadvertent error. After an examination of the Court's opinion, the Commission consciously determined that its previous report should be modified. Quoting from the opinion of the Court, it said.

> "In our judgment the quoted language failed on authorization . . . to serve intermediate points in Texas other than Orange and Beaumont, and requires that authority to serve those points be restricted to traffic moving from or to points east of the Texas-Louisiana line."[11]

The 1966 order in Docket No. MC-59680 (Sub. No. 117) was not the correction of a clerical error or caused by an inadvertent act of the Commission in 1961. The Commission in 1961 acted after careful examination of the Court's opinion and the certificates issued only after a determination that it was following the Court's opinion.

Under such circumstances Section 212(a) must be followed, notices issued, and a hearing had before a change can be made in the certificate. A case in point is *Watson Transportation Co. v. United States* 132 F. Supp. 905 (DC 1956) aff'd 350 U.S. 927. At page 909 the District Court stated "The only statutory authority for the suspension, change or revocation of . . . a certificate by the Commission is contained in Section 212(a) Part II of the Interstate Commerce Act." In the Watson case an order of the Commission issued without notice and hearing restricting the authority of the carrier with reference to the type of commodities it was authorized to haul was held by the Court to be void.

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[11]Exhibit C to Plaintiff's Complaint, p. 563.

In a similar case, *Movers Conference of America v. United States* 205 F. Supp. 83, 1962 the Court held:

> "We conclude that the proposed order does redefine 'household goods' in a manner different from the existing definition commonly accepted within the industry of both the carriers and the Commission. In our opinion the proposed redefinition narrows the term 'household goods' . . . Since the Commission proposes to do this by a procedure other than that set forth in 49 U.S.C.A. 312 (a) the order is clearly erroneous. . . ."

There can be no doubt that since the Commission's order of 1966 materially restricts the authority of Strickland, the action of the Commission in reopening Docket No. MC-59680 (Sub. No. 117) on its own motion without notice and hearing is void.

It might be contended that since Central had filed a petition to modify the certificate and in the complaint for violation had in the alternative asked for a modification, there was no need for the Commission to follow the procedure outlined by Section 212(a).

In order to determine whether a modification of the certificate had been considered, it is necessary to examine the record.

As heretofore stated, at the time the 1961 order was entered there was no contention that the order as modified did not conform to the decree of the Court. There was no appeal from the order and likewise there was a complete lack of any judicial attack upon the order until 1964, three years later, when Central filed a petition asking for a modification of the 1961 order. The petition was denied without any hearing or statement of facts by either party.

The complaint filed by Central at the same time as the petition for modification outlined with particularity alleged violations. Nothing was said in the body of the complaint about the certificate being ambiguous or not being in accord with the Court's decree. It was not until the prayer of the complaint that Central in the alternative prayed for a modification of the certificate.

After the filing of the complaint, statements submitted by the parties dealt exclusively with the alleged violations. Central specifically stated that the only question involved was the service authorized by the certificate.

It was not until the Hearing Examiner had recommended an order holding that Strickland had violated the certificate that the question of its meaning was mentioned. While there was a contention by Central at that time that the order was ambiguous, it was not attacked as not being in conformity with the Court's order.

Therefore, the Commission's subsequent modification of the certificate was done without discussion by the parties as to whether it was in accord with the Court's opinion and without a hearing on the conditions and restrictions of any proposed change in the certificate.

It was contended by the Commission that in modifying the certificate, it was merely acting "in furtherance of the Court's mandate" and therefore its action did not "fall within the scope of Section 212 of the Act."

While it is my opinion that where there is a conscious determination of the Court's opinion, a certifi-

cate thus entered cannot be changed without following the provisions of Section 212(a), it can be argued that if the Commission was clearly wrong in interpreting the Court's opinion in 1961, it would have authority to modify the certificate without complying with the aforesaid section of the Act.

It is necessary therefore to carefully examine the opinion to determine what its holding was. The plaintiffs in the district court had two main contentions, the first with reference to the procedure of the Commission in issuing the certificate, and with this we are not concerned.

The second point dealt with the substantiality of the evidence, plantiffs contending that granting the application was not bottomed or supported by substantial evidence viewing the record as a whole. The Court discussed in some detail the evidence relating to the existing service between Houston and New Orleans and between Houston and the principal intermediate points. With reference to the service from Orange and Beaumont on the one hand, and Houston on the other, the Court found there was no showing of inadequate service and in order to receive a grant of authority to Strickland for such local service, "evidence on the need for that particular service must be adduced." (p. 793) The Court then stated at p. 794 "so much of the certificate granting authority for new service between Beaumont-Orange and Houston must be set aside."

The concluding paragraph of the opinion states at p. 795 "Accordingly, the order is affirmed in part and set aside in part. Insofar as the order is set aside, the matter is remanded to the Commission for further consistent proceedings."

Footnote 42 has already been fully set out. It deals only with the restrictions on the service from or through Houston destined to Beaumont or Orange or to intermediate points between Orange-Beaumont and Houston, and on service from points east of Orange-Beaumont destined to any intermediate point between Orange-Beaumont or in the reverse direction.

There was no discussion in the entire opinion with regard to the remainder of the order. Therefore, it would appear that the only part of the Commission's order which it was directed to change was with regard to the service to Beaumont-Orange and intermediate points. The remainder of the Certificate was to be determined by the Commission and was not subject to restrictions by the Court. My conclusion is therefore that the certificate of 1961 is not contrary to the Court's order.

The Commission had authority to amend No. MC-59680 (Sub. No. 117) because of the remand order for "consistent proceedings." Such authority overcame any Section 212(a) requirements at that time. But to say that some years later, in a collateral proceeding, such authority would again overcome Section 212(a) is not correct. The order of March 15, 1961 amending Sub. No. 117 was according to the Commission's interpretation of what it thought the mandate of the Court meant. The issuance of the certificate by the Commission was the "final step in the Administrative process." *American Trucking Co. v. United States* 364 U.S. 1, 18 (1960).

The Commission was aware of the fact that its order of 1961 was final, no appeal having been taken, and

undoubtedly it was for that reason that it denied Central's petition filed in 1964 to reopen Cause No. 59680 (Sub. No. 117). By contending that the amended order was in conformity with the Court's opinion, its action would have been legal if there had been a clerical or ministerial error in the 1961 order.

It is my conclusion that the Commission erred in issuing a second amended certificate, and the decision and order of June 13, 1966 are null and void.

SARAH T. HUGHES
United States District Judge

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

CIVIL ACTION NO. 3-1932

STRICKLAND TRANSPORTATION CO., INC.,
Plaintiff

vs.

THE UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION,
Defendants

ORDER

This action having come on for hearing before this properly constituted three-judge District Court, and the issues having been duly heard, the Court is of the opinion, upon the facts, conclusions, and reasons set forth in its written opinion filed August 4, 1967, that the plaintiff is not entitled to the relief sought:

It is, therefore, ORDERED, ADJUDGED, and DECREED that the application of plaintiff for an injunction prohibiting the enforcement by, and to set aside the orders of, the Interstate Commerce Commission in its Docket Nos. MC-C-4472, *Central Freight Lines v. Strickland Transp., Inc.*, and MC-59680 (Sub-No. 117),

Strickland Transp. Co., Inc., Extension—Louisiana Routes, both reported at 102 M.C.C. 291, is hereby denied, and that plaintiff's complaint is hereby dismissed.

SIGNED this the 24th day of August, 1967.

IRVING GOLDBERG,
United States Circuit Judge

W. M. TAYLOR, JR.
United States District Judge

APPENDIX "E"

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

CIVIL ACTION NO. 3-1932

STRICKLAND TRANSPORTATION CO., INC.,
Plaintiff

vs.

THE UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION,
Defendants

ORDER GRANTING INJUNCTION PENDING APPEAL

Upon the verified application of plaintiff for an injunction pending appeal from the Order of this Court entered August 24, 1967, dismissing the complaint;

The Court, and each member thereof, does find: The preservation of the status quo as it existed on February 20, 1967, the day the complaint herein was filed; would not unduly prejudice the rights of the defendants or any of the parties intervening on behalf of the defendants, during the times plaintiff is perfecting its appeal.

In exercise of the discretion vested in this Court, pursuant to Rule 62(c) Federal Rules of Civil Pro-

cedure, by the assent of all of the Judges of this Court evidenced by their signatures to the Order:

It is ORDERED, ADJUDGED AND DECREED that the defendants and the parties intervening in behalf of the defendants, their officers, agents, servants, employees, and attorneys, be, and they are hereby enjoined and restrained until December 1, 1967, from:

1. Attempting to put into effect the Orders here under attack, same being dated June 13, 1966, and December 6, 1966.

2. Amending the Certificate of Public Convenience and Necessity issued to plaintiff and involved herein.

3. Taking any action which would change the status quo as the same existed on February 20, 1967, the date the complaint herein was filed.

It is further ORDERED, ADJUDGED AND DECREED that this injunction shall terminate on December 1, 1967.

This injunction is granted for the sole purpose of giving plaintiff an opportunity to perfect an appeal to the Supreme Court, since upon perfection of such appeal plaintiff will have an opportunity to apply to the Supreme Court for a continuance thereof.

Finally, it is ORDERED, ADJUDGED and DECREED that the granting of this injunction is conditioned upon the plaintiff's proceeding, in accordance with the applicable Rules, to perfect its appeal to the Supreme Court, and if said appeal be abandoned, this injunction shall come to an end.

RENDERED AND ENTERED as the Order of this Court, at Dallas, Texas, this 29 day of September, 1967.

IRVING GOLDBERG,
Circuit Judge.

SARAH T. HUGHES,
District Judge.

W. M. TAYLOR, JR.
District Judge.

APPENDIX "F"

INTERSTATE COMMERCE COMMISSION

No. MC-C-4472[1]

CENTRAL FREIGHT LINES, INC., ET AL. v. STRICKLAND TRANSPORTATION CO., INC.

Decided June 13, 1966

1. In No. MC-C-4472, defendant found not shown to be operating in interstate or foreign commerce in violation of the authority granted in its No. MC-59680 (Sub-No. 117) amended certificate. Complaint dismissed.

2. In No. MC-59680 (Sub-No. 117), proceeding reopened and upon further consideration, findings in prior report 84 M.C.C. 562, modified and certificate of public convenience and necessity issued pursuant thereto amended accordingly.

Charles L. Ford, Leroy Hallman, Morgan Nesbitt, H. L. Patterson, Jr., Oscar P. Peck, and *Phillip Robinson* for complaintants.

Ewell H. Muse, for defendant.

[1]This report also embraces No. MC-59680 (Sub-No. 117), *Strickland Transp. Co., Inc., Extension—Louisiana Routes,* which is reopened for further consideration by the Commission herein. The application of Southern-Plaza Express, Inc., in No. MC-10928 (Sub-No. 26), was also embraced in a report with that proceeding originally but the certificate issued to the latter carrier was revoked on April 4, 1962, and is therefore no longer involved here. See *Ryder System, Inc.—Control —Southern-Plaza Exp., Inc.,* 90 M.C.C. 87 and 85 M.C.C. 703.

REPORT OF THE COMMISSION

BROWN, *Commissioner:*

Exceptions to the order recommended by the examiner were filed by defendant, and complainants replied. Our conclusions differ from those recommended.

By complaint filed June 1, 1964, Central Freight Lines, Inc., of Waco, Tex., Herrin Transportation Company, of Houston, Tex., Roadway Express, Inc., of Akron, Ohio, the Missouri Pacific Railroad Company of St. Louis, Mo., and Southern Pacific Company of San Francisco, Calif., the complainants, jointly allege that defendant Strickland Transportation Co., Inc., of Dallas, Tex., is engaged in providing an unlawful transportation service to and from Beaumont and Orange, Tex., and points in the commercial zones and terminal areas thereof on shipments moving to and through Houston, without moving such shipments physically across the Texas-Louisiana State line in accordance with the restriction in its Sub-No. 117 certificate.* They jointly request that defendant be ordered to cease and desist from such alleged unauthorized operations. This proceeding was handled under modified procedure, making unnecessary the presentation of evidence at an oral hearing.

Defendant's Sub-No. 117 certificate authorizes serv-

*Complainants also allege that defendant has conducted certain unauthorized operations over a deviation route via Lake Charles, La., but inasmuch as the extent of any operations conducted over this route are dependent upon the scope of the operations authorized over its appurtenant service route, which is principally involved here, our conclusions with regard to this latter route will likewise be determinative of the scope of any operations that may lawfully be conducted over the deviation route.

ice over a specified regular route between Houston and New Orleans, serving the intermediate points of Beaumont and Orange, Tex., but restricts service at these latter points "to traffic moving to or from points east of the Texas-Louisnana State line." The defendant admits the performance of certain of the service complained of, specifically the transportation of shipments originating at or destined to Orange and Beaumont which were moving to or from points lying east of the Texas-Louisiana State line (or a northerly extension thereof) by handling them through Houston rather than physically moving them over the State boundary line between Texas and Louisiana. It takes the position, however, that these movements are authorized by its Sub-No. 117 certificate and denies the performance of any other transportation service which is not so authorized.

The principal issue presented then is whether this Sub-No. 117 certificate authorizes the transportation of traffic over the Texas route specified between Houston, on the one hand, and, on the other Beaumont and Orange, when that traffic originates at or is destined to points lying east of the Texas-Louisiana State line (or a northerly extension thereof) but is transported to or from Houston over one of defendant's other routes and thence to or from Orange or Beaumont over the regular route involved here, utilizing Houston as a tacking point or "gateway" for the movement rather than a Louisiana point on such route. Because of the direct dependence of any determination made in this proceeding upon defendant's Sub-No. 117 certificate and for the reasons indicated hereinafter, we are reopening the Sub-No. 117 proceeding for further consideration herein on our own motion.

The examiner found that defendant's Sub-No. 117 certificate limited it to the transportation of traffic originating at or destined to Orange and Beaumont, which moved to or from one of its authorized points of service in Louisiana only. He, therefore, concluded that the transportation by defendant of traffic moving to or from points east of a northerly extension of the Texas-Louisiana State line but which did not move through an authorized point on its route in Louisiana had been conducted without appropriate authority in violation of the provisions of the Interstate Commerce Act; and he recommended the entry of a cease and desist order.

On exceptions, defendant contends that the examiner's interpretation of the clear and unambiguous grant of authority contained in its Sub-No. 117 certificate effectively imposes restrictions not presently contained therein, including a no-tacking restriction and one limiting it to the transportation of traffic originating at or destined to points in Louisiana. It argues that there is no restriction in its present certificate which precludes service through Houston rather than through Louisiana points on traffic moving between Beaumont and Orange, on the one hand, and, on the other, points physically located east of the Texas-Louisiana State line on a northerly extension thereof; that such an interpretation by the examiner is contrary to established precedent; and that it constitutes a partial revocation of defendant's authority without compliance with section 212 of the act.

In reply, complainants take the position that while the terminology employed in the restriction in question may be susceptible of more than one meaning, the intent and plain language thereof precludes the trans-

portation of shipments over the involved route in either direction that do not physically move across the Texas-Louisiana State line on that route; that defendant offers and provides such a service; that the examiner's interpretation does not impose a no-tacking restriction; and that the certificate involved may be interpreted and clarified in this proceeding without in any manner revoking or nullifying any authority that defendant legitimately possesses. They urge that the recommended cease and desist order should be entered.

The evidence, the examiner's recommendations, the exceptions and the joint reply thereto have been considered. We find the examiner's statement of facts to be accurate and complete in all material respects and we adopt it as our own. It is unnecessary to restate any of the facts except to note that defendant is admittedly performing a single-line service over its regular routes between points which lie east of the Texas-Louisiana State line or a northerly extension thereof, on the one hand, and, on the other, Beaumont and Orange, without traversing any portion of Louisiana, by tacking the restricted authority contained in its Sub-No. 117 certificate authorizing service between Houston and these latter Texas points with other authority it holds to serve Houston, utilizing Houston as a gateway. Moreover, it is apparent that complainants promptly filed the complaint involved here when it became evident that defendant was performing such a service.

As the legality of the operations defendant admittedly conducts is directly dependent upon the retricted authority contained in its Sub-No. 117 certificate, we must initially determine the scope of the operations permissible thereunder. For this reason, we believe that a brief review of the circumstances surrounding

its issuance will aid in understanding the issues presented.

After extensive hearings and the compilation of a voluminous record, the entire Commission, by report and order of October 14, 1958, granted defendant authority in *Strickland Transp. Co., Inc., Extension—Louisiana Routes,* 77 M.C.C. 655, which would authorize it to provide service over a described regular route between Houston, Tex., and New Orleans, La., serving all intermediate points, but with service at Baton Rouge, La., restricted to traffic moving to or from points west of the Louisiana-Texas State line; and a certificate authorizing such service was subsequently issued. Certain of the protestants, including several of the complainants herein, filed actions in the United States District Court for the Southern District of Texas, Houston Division, seeking to set aside this order, and in *T.S.C. Motor Freight Lines, Inc. v. United States,* 186 F. Supp. 777, affirmed *Herrin Transp. Co., v. United States,* 366 U.S. 419, the court, as here pertinent, set the order aside in part and remanded the proceeding to us for further consistent proceedings. After reviewing the record it found that there was no showing of inadequacy in the service available between Beaumont and Orange, on the one hand, and, Houston, on the other. While it initially recognized the correctness of the position of those supporting the Commission's order and the adequacy of the evidence and findings to sustain that order insofar as applicant was not precluded from tacking the authority granted with any other authority it held, the court specifically found that the real issue was not whether tacking should be allowed but rather whether there had been the requisite finding of need for granting any authority

to provide service between the Houston terminus of the route authorized and the intermediate points in Texas, including Orange and Beaumont. After considering the evidential support for the authority sought to serve these intermediate points in both (a) local service, and (b) through service to other points applicant could serve by utilizing Houston as a gateway, the court concluded that a grant of authority to perform either service was not adequately supported by evidence of public convenience and necessity as was the broader authority sought between Houston and New Orleans. In the absence of such evidence it found that so much of the certificate granting authority for a new service between Beaumont-Orange and Houston, and points intermediate thereto, must be set aside and, in remanding the proceeding to the Commission, it indicated with some specificity what part of that service formerly authorized by the portion of the certificate set aside should be authorized in further proceedings. Thus, the court stated:

> As the case has to be remanded to the Commission with respect to this phase, we do not undertake to set this forth in terms having the precision of a certificate. But under our holding, except for Strickland's existing authority, the applicants will not be permitted to engage in the following transportation:
>
> (1) Service from or through Houston destined to Beaumont or any point between Houston and Beaumont, or in the reverse direction,
>
> (2) service from or through Houston destined to Orange or any point between Houston and Orange, or in the reverse direction,
>
> (3) service from points east of Orange-Beau-

mont destined to any *intermediate point between* Orange-Beaumont and Houston, or in the reverse direction. (This would not restrict, for example, a shipment from Baton Rouge to Orange or Beaumont, or the reverse.) (186 F. Supp. 777, 794, ft. nt. 42).

On further consideration, by report of March 15, 1961, 84 M.C.C. 562, we concluded that the findings in the prior report should be modified to conform to the decree of the court and after quoting, in substantial part, the above language from the court's opinion, we indicated that in our judgment it not only did forbid authorization to applicant to serve intermediate points in Texas other than Orange and Beaumont, but that it also required that authority to serve these latter points be restricted to traffic moving from or to points east of the Texas-Louisiana State Line.* Subsequently, an amended certificate reflecting this modification was issued to defendant and, as indicated, it is the defendant's operations under this certificate that are at issue here.

At the outset, it should be noted that the restriction imposed in defendant's Sub-No. 117 certificate with reference to service at Orange and Beaumont clearly forbids the performance of "local" interstate service, as the court intended, between those points and other Texas points in the same manner and by the same terms as did another restriction initially imposed in the Sub-No. 117 proceeding which effectively precluded the

*The Texas-Louisiana State line was used only as an easy point for reference and the restriction relates equally to points lying to the east of a northerly extension thereof within the United States. References of this type have been consistently so employed and interpreted. See *Riss & Co., Inc.—Control and Merger*, 60 M.C.C. 557.

movement of traffic between Baton Rouge and other Louisiana points. On the other hand, it does not prohibit the transportation of shipments not originating at or destined to points in Louisiana so long as they move through Louisiana and such service is not precluded by the court. See (3) above in the quoted portion of the court's opinion and *Marcell-Interpretation of Certificate,* 62 M.C.C. 694. Moreover, no objection is raised to this type of transportation.

It is apparent, however, that the restriction as it is presently framed does not preclude a "through" service by tacking at Houston on traffic moving over the involved route which meets the requirements imposed by that restriction, namely, that such traffic move to or from points east of the Texas-Louisiana State line. Thus, by its terms, it would allow the transportation defendant is performing which is the gravamen of the complaint here because the traffic of the type handled has met this condition. Or, in other words, this transportation may be performed in such a manner as to give effect to the restriction. Compare *Marcell's Motor Exp., Inc.—Investigation of Operations,* 74M.C.C. 683 and 78 M.C.C. 688. As it cannot be said, therefore, that defendant is violating the terms of its certificate, no cease and desist order will be issued.

As indicated, however, the court specifically found it to be an error of law to grant that portion of the authority sought as described in (1) and (2) of the language quoted from the court's opinion above for the reason that it was not adequately supported by the evidence and would result in a new service for which the court found no need had been established. This clearly precludes operations of the scope defendant

is conducting here because they involve "service from or through Houston destined to Beaumont (and Orange) * * *, or in the reverse direction." No further record was made nor were there any supplementary findings which were not expressly stated in our report on further consideration to be in accordance with the opinion and mandate of the court. In the circumstances, we are bound by the opinion of the court and any broader grant of authority made contrary thereto, however, unintended, would fail to meet either its mandate or statutory requirements.

Therefore, in view of the now apparent discrepancy between the scope of the grant of authority regarding operations between Orange, Beaumont, and Houston which we were authorized to issue upon the court's setting aside of that authority and its remand to us for a grant consistent with its opinion, on the one hand, and, on the other, the broader extent of those operations described heretofore which can be performed under defendant's amended certificate in its present form, there is no alternative but to issue a second amended certificate reflecting a suitable modification in our findings in the prior report on further consideration in No. MC-59680 (Sub-No. 117).

Our action here is in furtherance of the court's mandate and it does not therefore fall within the scope of section 212 of the act which is only a limitation on the power of the Commission and not on the power of the court. In *Asbury Transportation Co. v. United States*, 236 F. Supp. 322, a plaintiff sought to enjoin the issuance of a certificate on the grounds that once issued the certificate could not be revoked. After setting forth the provisions of section 212(a), the court stated, at page 325:

A reading of the statute leads this court to the conclusion that it was intended as a limitation on the power of the Interstate Commerce Commission. It nowhere includes the courts as subject to its limitation. * * *

* * * * * *

* * * But however the judgment affects the order of the Commission, the certificate is commensurately affected and the court's power over the certificate is implicit in the congressional grant of review of the Commission's order that a certificate issue.

In *American Trucking Association, Inc. v. United States,* 364 U.S. 1, the Supreme Court, in reversing the judgment of the lower court, set aside and annuled the Commission's order, thereby effectively revoking and cancelling the outstanding authority involved in that proceeding. Moreover, when the court has exercised jurisdiction to review and suspend a report and order of the Commission, we are without power to act inconsistently. *Inland Steel Co. v. United States,* 306 U.S. 153, and *cf. Ford Motor Co. v. National Labor Relations Board,* 305 U.S. 364, *Texas & Pacific Ry. Co. v. Interstate Commerce Commission,* 162 U.S. 197. Here, then, we are merely making a second correction in a certificate issued subsequent to a remand by the court in conformance with that remand.

This amended certificate will be further amended as set out in the appendix hereto so as to restrict the service authorized at Houston, Beaumont and Orange in the following manner:

Serving the intermediate points in Texas of Orange and Beaumont, with service as points in the Orange, Beaumont, and Houston commercial

zones restricted to the transportation of traffic moving to or from points on the below-described route in Louisiana.

Defendant is admonished to comply with the terms of this amended certificate and to cease operations of the type involved herein.

The conclusions reached herein are, of course, limited to the scope of the authority contained in defendant's Sub-No. 117 certificate and do not relate in any manner to any other authority that defendant may hold.

An appropriate order will be entered.

CHAIRMAN BUSH, dissenting in part:

I am in accord with the findings and conclusions of the majority that Strickland Transportation Co., Inc., has not been shown to be operating in interstate or foreign commerce in violation of the authority granted in its No. MC-59680 (Sub-No. 117) amended certificate. The complaint is, therefore, properly dismissed.

There are, however, no lawful grounds for reopening the No. MC-59680 (Sub-No. 117) proceeding for the purpose of issuing a "* * * second amended certificate * * *"; admonishing Strickland and ordering it "* * * to cease operations of the type involved herein * * *"; and determining that "Since our action here is in furtherance of the court's mandate it does not fall within the scope of section 212 of the act * * *"

It is axiomatic that litigation of a particular case must at some time come to an end. Such is appropos to the Sub-No. 117 proceeding which was instituted on *June 21, 1954* and has been considered by both the Com-

mission and the courts throughout the ensuing years until September 23, 1964. On this latter date the joint late-filed petition of protestants, which was accepted for filing, was denied by the Commission, notwithstanding the pendency of the complaint proceeding. Noticeably absent is the lack of any judicial attack whatsoever upon our action and our corresponding determination subsequent to prior judicial review in Sub-No. 117. Thus, in my view, complainants in the present collateral attack in the titled proceeding, notwithstanding their failure to sustain their burden of proving unlawful operation by Strickland, are the recipients of a *windfall* by the decision of the majority in embracing Sub-No. 117 herein, amending Strickland's certificate, without notice thereof and an opportunity to be heard, pursuant to the provisions of the Interstate Commerce and Administrative Procedure Acts. Such constitutes revocation of a legal right by administrative fiat and contravenes all elements of *fair play*. The theoretical concepts for reopening this proceeding, namely "* * * the direct dependence of any determination made in this proceeding upon defendant's (Strickland's) Sub-No. 117 certificate and for the reasons indicated hereinafter * * *" do not fill the existing void of noncompliance with the aforesaid statutory requirements. Furthermore, noticeably absent throughout the report are the alleged "* * * reasons indicated hereinafter * * *."

While the court, in reversing the prior decision herein, properly recognized that its task was limited to determining whether our conclusion finds support in the record as a whole even though the court would have made a different choice had the matter been before it *de novo,* the court lacked jurisdiction to make the following determination:

42 As the case has to be remanded to the Commission with respect to this phase, we do not undertake to set this forth in terms having the precision of a certificate. But under our holding, except for Strickland's existing authority, the applicants will not be permitted to engage in the following transportation:

(1) Service from or through Houston destined to Beaumont or any point between Houston and Beaumont, or in the reverse direction,

(2) service from or through Houston destined to Orange or any point between Houston and Orange, or in the reverse direction,

(3) service from points east of Orange-Beaumont destined to any *intermediate point between* Orange-Beaumont and Houston, or in the reverse direction. (This would not restrict, for example, a shipment from Baton Rouge to Orange or Beaumont, or the reverse.)

To the above extent, such action was an unlawful invasion by the judiciary into the realm of this Commission's expertise, and I find no legal mandate for exemption from the requirements for amendment, or revocation in part, of Strickland's certificate from the provisions of section 212(a) of the Interstate Commerce Act. Admittedly, once a United States District Court assumes jurisdiction and takes affirmative action against a Commission order, we are temporarily bound to accept its decision to restrain our action until judicial review has been affirmed by the highest court of our land, notwithstanding the issuance of a certificate. In *Asbury Transportation Co. v. United States,* 236 F. Supp. 322, on October 21, 1964, the court issued a Temporary Restraining Order and Order to Show Cause against the order of the Commission, but there-

after denied plaintiff's motion for Preliminary Injunction. Plaintiff thereafter applied directly to Justice William O. Douglas in the Supreme Court of the United States for a Writ of Injunction pending appeal to forestall issuance of a certificate by the Commission. Although this application for a writ was denied by Justice Douglas on December 7, 1964, plaintiff is not precluded from making the same assignments of error, among others, upon subsequent appeal to the full court after a final decision is rendered by the lower court. Such has not been rendered to date so that the principle enunciated by the majority has not at this time become a controlling rule of law.

In *American Trucking Assns. v. United States,* 364 U.S. 1, 18, (1960), in reversing the judgment of the District Court and remanding the case to that court with directions to remand to the Commission for such further proceedings, not inconsistent with its opinion, as may be appropriate, the Supreme Court made it expressly clear that "* * * in remanding the case we do not intend to circumscribe the Commission in determining whether appropriate 'special circumstances' do exist in this instance which would take the case out of the otherwise conventional standards." Thus, the Supreme Court did not effectively revoke and cancel the outstanding authority involved in that proceeding, nor were the outstanding permits *ipso facto* deemed null and void by reason of the mere setting aside of the Commission's order granting such permits. Such becomes readily apparent from subsequent events. In the District Court the carrier moved for an order that upon its remand of the case to the Commission, it be permitted by the District Court's order to continue in effect its contract carrier service under the permits

in issue before the Supreme Court. The District Court denied the above motion "* * * without prejudice to determination by the Interstate Commerce Commission as to whether or not the permit granted by said Commission should remain in effect pending action on the remand directed by the Supreme Court of the United States." On the same day the District Court issued its remand ordering.

> * * * the case * * * remanded to the Interstate Commerce Commission for such further proceedings, not inconsistent with the Supreme Court's opinion, as may be appropriate, including determination as to whether or not permit heretofore granted by the Interstate Commerce Commission should remain in effect pending action on the remand directed by the United States Supreme Court.

The Commission allowed the permit to remain in effect pending final determination of the proceeding, and such action went unchallenged. *American Trucking Assns. v. United States (supra),* is not, therefore, judicial precedent in support of the majority in "* * * merely making a *second* correction in a certificate issued subsequent to a remand by the court in conformance with that remand." [emphasis added] and then proceed to further amend Strickland's amended certificate.

I would, therefore, not reopen the No. MC-59680 (Sub-No. 117) proceeding under the circumstances presented herein.

COMMISSIONER WEBB, dissenting in part:

I agree with the majority that Strickland's questioned operations did not exceed the authority issued

to it in No. MC-59680 (Sub-No. 117). In my opinion, however, the concern of the Commission and of the remanding court in the framing of the Strickland certificate ended when the parties accepted our decision on remand in No. MC-59680 (Sub-No. 117) and acquiesced in the issuance of the certificate in that proceeding.

APPENDIX

Form of amended certificate to be issued

NO. MC-59680 (SUB-NO. 117)

General commodities, except those of unusual value, classes A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment, between Houston, Tex., and New Orleans, La., serving the intermediate points in Texas of Orange and Beaumont, with service at points in the Orange, Beaumont, and Houston commercial zones restricted to the transportation of traffic moving to or from points on the below-described route in Louisiana, and serving all intermediate points in Louisiana, with service at Baton Rouge, La., restricted to traffic moving to or from points west of the Louisiana-Texas State line; From Houston over U. S. Highway 90 to Iowa, La., thence over U. S. Highway 165 to Kinder, La., thence over U. S. Highway 190 to Baton Rouge, La., thence over U. S. Highway 61 to New Orleans, and return over the same route.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Wash-

ington, D. C., on the 13th day of June, 1966.

No. MC-C-4472

CENTRAL FREIGHT LINES, INC., ET AL.

v.

STRICKLAND TRANSPORTATION CO., INC.

No. MC-59680 (Sub-No. 117)

STRICKLAND TRANSPORTATION CO., INC.
EXTENSION—LOUISIANA ROUTES

It appearing, That the proceeding in No. MC-C-4472, having been duly instituted and full investigation of the matters and things involved having been made, and the Commission, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It further appearing, That on October 14, 1958 and March 15, 1961, the Commission entered its reports, 77 M.C.C. 655 and 84 M.C.C. 562, and order in No. MC-59680 (Sub-No. 117), authorizing the issuance of certain operating rights;

and good cause appearing therefor:

It is ordered, That the proceeding in No. MC-59680 (Sub-No. 117) be, and it is hereby, reopened on our own motion for further consideration on the present record;

It is further ordered, That further consideration of the matters and things involved in these proceedings has been given and that the Commission, on the date hereof, has made and filed a report herein containing its findings of fact and conclusions thereon, which

report and the said reports of October 14, 1958 and March 15, 1961, are hereby referred to and made a part hereof.

It is further ordered, That the certificate of public convenience and necessity No. MC-59680 (Sub-No. 117), issued to the holder thereof pursuant to the said reports of October 14, 1958 and March 15, 1961, be, and it is hereby, modified as provided and conditioned in the said report herein.

And it is further ordered, That the complaint in No. MC-C-4472 be, and it is hereby, dismissed and that the said proceeding be, and it is hereby, discontinued.

By the Commission.

H. NEIL GARSON,
Secretary.

(Seal)

APPENDIX "G"

No. MC-59680 (Sub-No. 117)[1]

STRICKLAND TRANSPORTATION CO., INC., EXTENSION—LOUISIANA ROUTES

Decided March 15, 1961

Upon further consideration, findings in prior report, 77 M.C.C. 655, modified, and certificates of public convenience and necessity issued pursuant thereto amended accordingly.

Appearances as shown in the prior report.

REPORT OF THE COMMISSION ON FURTHER CONSIDERATION BY THE COMMISSION:

By report, 77 M.C.C. 655, and order herein, dated October 14, 1958, we granted the respective applicants, Strickland Transportation Co., Inc., and Southern-Plaza Express, Inc., both of Dallas, Tex., certificates of public convenience and necessity authorizing operations as common carriers by motor vehicle of general commodities, with certain exceptions, between Houston, Tex., and New Orleans, La., over described regular routes, serving all intermediate points subject to certain restrictions. Petitions for reconsideration and further hearing were denied by our order dated April 10, 1959, and appropriate certificates were issued to Strickland and Southern-Plaza on April 24 and May 6, 1959,

[1] This report also embraces No. MC-10928 (Sub-No. 26), Southern-Plaza Express, Inc., Extension—Louisiana Routes.

respectively. The pertinent portions of such certificates are reproduced in the appendix hereto.

In *T.S.C. Motor Freight Lines, Inc., v. United States*, 186 F.Supp. 777 (1960), the United States District Court for the Southern District of Texas, Houston Division, pursuant to actions filed by certain of the protestants, affirmed in part and set aside in part our order of October 14, 1958, remanding the matter to us for further consistent proceedings insofar as the order was set aside.

The following language from the court's decision is pertinent:

> so much of the certificate granting authority for new service between Beaumont-Orange and Houston must be set aside. This will not affect the existing authority of Strickland to operate from Houston to Beaumont, but not in the reverse direction.
>
> * * * * * *
>
> under our holding except for Strickland's existing authority, the applicants will not be permitted to engage in the following transportation:
>
> (1) Service from or through Houston destined to Beaumont or any point between Houston and Beaumont, or in the reverse direction, (2) service from or through Houston destined to Orange or any point between Houston and Orange, or in the reverse direction, (3) service from points east of Orange-Beaumont destined to any *intermediate point between* Orange-Beaumont and Houston, or in the reverse direction. (This would not restrict, for example, a shipment from Baton Rouge to Orange or Beaumont, or the reverse.)

In our judgment, the quoted language forbids an

authorization to either applicant to serve intermediate points in Texas other than Orange and Beaumont, and requires that authority to serve those points be restricted to traffic moving from or to points east of the Texas-Louisiana State line. No appeal from the court's conclusions in this respect has been taken by any party to the action.

We conclude that the findings in the prior report herein should be modified to conform to the decree of the court.

Upon reconsideration, we conclude that the prior report and order herein should be, and they are hereby, modified so as to authorize each applicant to transport the commodities indicated, between the termini, and over the routes, specified in their present certificates as described in the appendix hereto, with service at intermediate points in Louisiana as specified, and with no service at intermediate points in Texas except as follows:

> Serving the intermediate points of Orange and Beaumont, Tex., restricted to traffic moving to or from points east of the Texas-Louisiana State line.

Amended certificates reflecting the modification in the findings in the prior report will be issued to the respective applicants.

Since the order of October 14, 1958, remains in effect except to the extent set aside by the court, as reflected in the modification herein of the prior findings, no further order is necessary.

COMMISSIONER FREAS, concurring:

In the prior report of the Commission I dissented

for reasons I find still valid. However, since the remand of the court is limited to proceedings consistent with its findings, I agree that the restriction imposed herein correctly determines the matter before us.

COMMISSIONER GOFF concurs in the result.

CHAIRMAN HUTCHINSON and COMMISSIONER HERRING did not participate.

APPENDIX

Excerpt from certificate issued to Strickland Transportation Co., Inc., on April 24, 1959, in No. MC-59680 (Sub-No. 117)

General commodities, except those of unusual value, class A and class B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment, between Houston, Tex., and New Orleans, La., serving all intermediate points, but with service at Baton Rouge, La., restricted to traffic moving to or from points west of the Louisiana-Texas State line: From Houston over U.S. Highway 90 to Iowa, La., thence over U.S. Highway 165 to Kinder, La., thence over U.S. Highway 190 to Baton Rouge, La., thence over U.S. Highway 61 to New Orleans, and return over the same route.

Excerpt from certificate issued to Southern-Plaza Express, Inc., on May 6, 1959, in No. MC-10928 (Sub-No. 26)

General commodities, except those of unusual value, class A and class B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment, between Houston,

Tex., and New Orleans, La., serving all intermediate points, but with service at Lafayette, La., and intermediate points between Lafayette and New Orleans restricted to traffic moving to or from points west of the Louisiana-Texas State line: From Houston over U.S. Highway 90 via Lafayette to New Orleans, and return over the same route.

APPENDIX "H"

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CIVIL ACTION NO. 12,620

T.S.C. MOTOR FREIGHT LINES, INC., and
HERRIN TRANSPORTATION CO., INC.,
Plaintiffs,

and

CENTRAL FREIGHT LINES, INC., and
EAST TEXAS MOTOR FREIGHT LINES, INC.,
Intervening Plaintiffs,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SOUTHERN-PLAZA EXPRESS, INC., and
STRICKLAND TRANSPORTATION CO., INC.,
Defendants.

Before BROWN, Circuit Judge, CONNALLY and INGRAHAM, District Judges. BROWN, Circuit Judge:

This is an action by four motor carriers (TSC, Herrin, Central and East Texas)[1] to set aside certificates

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[1]Original plaintiffs, protestants before the Commission, both of which operate between Houston and New Orleans over the routes involved serving the points sought by the applicants, are:

of public convenience and necessity, issued under §207 (a) of the ICC Act, 49 USCA §307(a), authorizing two additional motor carriers (Southern-Plaza and Strickland)[3] to operate between Houston and New Orleans.[4] We uphold the awards, but with some modification, against a succession of attacks.

In 1954 Strickland applied for a certificate of public convenience and necessity for motor carriage of general commodities between Houston and New Orleans,[5] and in 1955 Southern-Plaza applied for a similar authority.[6] This followed on the heels of a recent major but unsuccessful attempt of these carriers to secure authority to operate between Houston and New Orleans.[7] Strickland's application sought Houston-New

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T.S.C. Motor Freight Lines, Inc. (TSC) and
Herrin Transportation Co., Inc. (Herrin).

The Intervening plaintiffs are:
Central Freight Lines, Inc. (Central) and
East Texas Motor Freight Lines, Inc. (East Texas).

Central operates between Orange, Texas and Houston over the route sought while East Texas, with somewhat limited authority, operates between Beaumont and Houston but not over the identical route here involved.

[3]Defendant (applicant) carriers are:
Southern-Plaza Express, Inc. (Southern-Plaza) and
Strickland Transportation Co., Inc. (Strickland).

[4]The complaint filed by the interested motor carriers is for review by statutory three-judge court. 28 USCA §§1336, 1398, 2284, 2321-2325; Administrative Procedure Act, 5 USCA §1001 et seq.

[5]Strickland Trans. Co., Extension, La. routes, No. MC-59680 (Sub. No. 117), filed June 21, 1954.

[6]Southern-Plaza Express, Extension, La. routes, No. MC-10928 (Sub. No. 28), filed September 26, 1955.

[7]Both Strickland and Southern-Plaza (then Southern Express, Inc.) had previously (by application filed in 1947) attempted to establish a need for additional motor transportation facilities between Houston and New Orleans. After extensive hearings, former Division 5 of the ICC found in

Orleans authority over two routes, the one via Beaumont, Texas, and Lafayette, Louisiana, called the "southern" route, and the other via Beaumont and Baton Rouge, Louisiana, called the "northern" route. The Southern-Plaza application sought authority over the northern route only.

Both of the applicants, Strickland and Southern-Plaza, are large trucking concerns with operations extending into several states. Both serve a number of major cities in Texas, such as, Dallas, Fort Worth, San Antonio, and Houston and operate between these points (among others) and such centers as St. Louis and Chicago. Strickland now holds authority to operate from Houston to Beaumont, over the route involved here, but not in the reverse direction.

After extensive hearings before Hearing Examiner Ross, the Examiner in a single report served in October 1957 recommended orders *denying* both applications. Exceptions and replies to the Examiner's report were filed, and the proceedings in the usual course were referred to Division 1 of the Commission "for action thereon." Thereafter, without any public report by Division 1 the matter was referred to the entire Commission. By a final report[1] issued October 14, 1958, the full Commission, while substantially adopting the Examiner's detailed statement of the facts, rejected the Examiner's recommendation and granted both appli-

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favor of the applicants. But on reconsideration, Southern Exp., Inc., Common Carrier Application, 62 MCC 35 (1953), the full Commission reversed the Division 5 findings and denied the applications.

[1] ICC Report, 77 MCC 655, decided October 14, 1958. Two Commissioners dissented and three Commissioners did not participate.

cations. Strickland was awarded the so-called "northern" route[4] between Houston and New Orleans and Southern-Plaza, the "southern" route.[5]

Petitions for reconsideration and further hearing filed by the protesting carriers were denied in April 1959 "for the reason that the findings of the Commission are in accordance with the evidence and the applicable law." The Commission made no other basic findings or conclusions in connection with its order denying reconsideration.

The plaintiffs then filed this proceeding attacking the merits of the grants to Strickland and Southern-Plaza and also much of the procedure of the Commission in its handling of these applications. Specifically, the plaintiffs here complain of the procedure by which the Commission (1) issued its report without first having had Division 1 issue a report on the applications, (2) issued its report as the result of "constructive" sessions at which the members were not physical-

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[4] "We find in No. MC-59680 (Sub. No. 117) that the present and future public convenience and necessity require operation by applicant (Strickland), in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities * * * between Houston, Tex., and New Orleans (via specified highways) * * * to Baton Rouge, La., thence * * * to New Orleans, and return over the same route, serving all intermediate points, but with service at Baton Rouge restricted to traffic moving to or from points west of the Louisiana-Texas State line * * *." ICC Report, note 7, supra, 77 MCC 655, 669.

[5] "We find in No. MC-10928 (Sub. No. 26), that the present and future public convenience and necessity require operation by applicant (Southern-Plaza), in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities * * * between Houston and New Orleans, over U. S. Highway 90, through Lafayette, La., serving all intermediate points between Lafayette and New Orleans restricted to traffic moving to or from points west of the Louisiana-Texas State line * * *." ICC Report, note 7, supra, 77 MC 655, 669.

ly present, (3) allegedly had certain of its Attorney-Advisors, who were not Hearing Examiners, review the proceedings and make recommendations to the Commissioner, and (4) failed to make any additional findings on the petition for reconsideration and further hearing.

I.

Procedure in Handling the Applications

A. Action by Division 1

After the Hearing Examiner issued his report recommending *denial* of both applications, the matters (including exceptions to the report and replies) were submitted to Division 1 of the Commission "for action thereon." This is the normal procedure under the Commission's organizational rules[10] which delegate §205 proceedings to Division 1. Normally the division renders a decision and issues a dispositive report and order subject to the right of the parties to petition for reconsideration by the entire Commission.[11]

Departing from the usual course here, however, Division 1 did not make an official formal report. The proceedings were rather submitted directly to the en-

[10]The Commission's organizational procedure and delegation of duties are basically governed by §17 of the ICC Act. 49 USCA §17. Section 17(1) provides that "The Commission is authorized by its order to divide the members thereof into as many divisions * * * as it deems necessary, which may be changed from time to time. * * *." Section 17(2) provides that "the Commission may by order direct that any of its work, business, or functions * * * be assigned or referred to any division * * *." Pursuant to this general authority, the Commission promulgated and published its Organization of Divisions and Assignment of Work of the Interstate Commerce Commission, 28 F. R. 1747.

[11]ICC Organizational Rules, note 10, supra, §§4.1, 4.2(g).

tire Commission. Plaintiffs contend that the matters were not properly before the full Commission and that the Commission violated its organizational rules.

The Commission's organizational rules allow a division to "call upon the whole Commission for advice and counsel, or for consideration of any case or question by * * * additional Commissioners * * *." By the same token, "the Commission may recall and bring before it as such any case, matter or question" pending before any division." The Commission never did enter an official order of recall. It seems to be generally assumed that the impetus for Commission action came from Division 1 who purported to certify the whole case to the full Commission."

Plaintiffs have several objections to the purported certification by Division 1. First they claim that there

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"ICC Organizational Rules, note 10, supra, §2.3 23 F. R. 1747, 1748. "Each division with regard to any case or matter assigned to it * * * may call upon the whole Commission for advice and counsel, or for consideration of any case or question by an additional Commissioner or Commissioners assigned thereto; and the Commission may recall and bring before it as such any case, matter or question so allotted or assigned and may either dispose of such case, matter or question itself or refer the matter to the same or another division."

"A memorandum dated July 23, 1953, made by the clearance clerk for Division 1, reports the decision of Division 1 to certify the proceedings to the entire Commission.

"July 23, 1958

"MEMORANDUM TO DIRECTOR COYLE

"Division 1, COMMRS. MURPHY, WALRATH & GOFF, has today voted to certify the report circulated June 3, 1958 to the entire Commission for consideration and decision; COMMR. WALRATH voting to return the report for revision to grant both applications."

The "report circulated June 3, 1958" referred to in the memorandum indicates that Division 1 apparently had drafted a report.

is no authority for such a certification of the entire case. That can only be accomplished by an order of recall by the entire Commission. Second, even assuming that the Division could certify the whole case, the effort was ineffective here since the decision to certify was not properly recorded. Giving substance to their objections, plaintiffs argue that they had proceeded on the basis of Division action. Thus, briefs and other matters were prepared with Division 1, not the entire Commission, in mind. Had they known that it was to be the full Commission who would decide the case, the approach may have been quite different. Also, they contend that due to the abdiction of Division 1, the protestants were deprived of a favorable[14] report by the Division or an opportunity, if the report were unfavorable,[15] to file a petition for reconsideration by the entire Commission together with additional briefs pointing out the errors of the Division report.

The certification of the cases to the Commission by Division 1 complies in all substantial respects with

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[14]The "report circulated June 3, 1958," may have recommended denial of the applications. The clerk's memorandum, note 13, supra, recites that Commissioner Walrath voted "to return the report for *revision* to grant *both* applications." (Emphasis supplied.) Therefore, the tentative report may have been either a denial of both applications or a grant of one application and denial of the other.

[15]Applicants have some ground for thinking that the report may have recommended granting at least one of the applications. The clearance clerk's memorandum, note 13, supra, indicates that Commissioner Walrath favored granting both applications. Commissioner Goff finally dissented from the Commission's granting of both applications. Commissioner Murphy (who replaced Commissioner Hutchinson) eventually voted with the entire Commission to grant both applications. But apparently Commissioner Murphy and Commissioner Goff felt that the cases should go before the whole Commission.

the Commission's organizational rules. This is so whether viewed as either a request by Division 1 for "advice and counsel" or as the assignment of additional Commissioners to consider the case. In either event, when the Commission accepted the certification and undertook to receive the issues presented, its action in effect amounted to a recall of that matter from the Division. This rule—whose purpose was to announce the orderly internal procedure of the Commission—provided its own exception; namely, consideration by the entire Commission whenever they deemed it expedient. Whether the initiating force for such a consideration by the entire Commission came from the Division or the Commission seems unimportant.

The vote to request consideration by the entire Commission was recorded in a memorandum prepared by the clearance clerk for Division 1, note 13, supra. There is no minute entry reflecting the action and the clerk's memorandum was not publicly recorded or served on the parties. Plaintiffs argue the action was a nullity in violation of §17(3) of the ICC Act which provides that "[E]very vote and official act of the Commission, or any division * * * shall be entered of record, and such record shall be made public upon the request of any interested party." The purpose of this provision is to insure that parties have an opportunity to know of any action which may effect their rights. It is especially necessary in cases in which an order of the division may become final within 20 days if no exceptions are filed by the parties."

It is difficult to see how the plaintiffs could have been prejudiced by the failure to record the action of

"See, e.g., 49 USCA §17(5).

Division 1 since it resulted in a consideration by the entire Commission of the proceedings. What the whole Commission has relegated, it obviously could recall and consider as a body."[11] Moreover, the protestants could not have challenged the right of the Commission to take the whole case. They lost no right to complain nor to complain by a certain time. In the absence of prejudice, the action of the Commission must stand. See §10(c), 3 USCA §1009(e); ABC Freight Forwarding Corp. v. United States, S.D.N.Y., 1959, 169 F. Supp. 403, 406, citing Market Street Railway v. Commission, 1945, 324 U. S. 548, 561-562, 65 S. Ct. 770, 89 L.Ed. 1171.

Secondly, it is difficult to see how the plaintiffs could have been injured by the failure of Division 1 to issue a report. The referral to Division 1, in the first instance, was merely a permissive delegation of the Commission's responsibility to determine the case. The contention that if the circulated but undisclosed report was unfavorable, the protestants were deprived of an opportunity to file a petition for reconsideration by the entire Commission overlooks the fact that this is exactly what occurred—the matter was considered by the entire Commission. Plaintiffs still had the right to petition for reconsideration after the report of the entire Commission. And this, of course, they did. The argument that the briefs may have been written differently if the plaintiffs had known that the persons deciding the case were other than those expected needs little comment. The Commission is, of course, an institutional agency and the appeal must be to the institution, not to the personal predilection of the individual

[11]See note 10, supra.

members. The make-up of the divisions, as the make-up of the Commission, may change. In any event, new arguments or appeals could be made in amended or supplemental briefs.

B. "Constructive" Sessions—Notation Voting

Plaintiffs argue that the final report and orders of October 14, 1958, note 7, supra, were invalid because adopted by the Commission through voting by notation[18] rather than at a conference at which the Commission members were physically present and assembled together. Plaintiffs attack this procedure as calling for action of individual members of the Commission rather than the official action of the Commission

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[18]The vote-by-notation procedure is set up in the minutes of the Commission of October 2, 1953:

"3. CONSTRUCTIVE SESSIONS: ACTION BY NOTATION.

"(A) At other than regular or special conferences official action may be taken by the Commission * * * (or) any division * * * in constructive session through voting by notation. For this purpose (1) a copy of the report, order, or other document under consideration may be used as a manuscript on which each Commissioner * * * will indicate his vote, or (2) each Commissioner * * * may cast his vote by separate memorandum. In each instance, the participating Commissioners * * * may informally confer * * * or exchange their views in writing. * * * (T)he date of decision shall be the date upon which the last individual vote is cast. If, before the votes of all others participating in the voting have been cast, any Commissioner * * * shall request, in writing, conference consideration, or if in the judgment of the Commissioner * * * through whose office the votes are to be cleared undue delay in the voting occurs the subject-matter will be transferred to an appropriate conference agenda.

"(B) The vote by memorandum of each Commissioner * * * shall be sent to the Commissioner * * * through whose office the matter is to be cleared. Copies of such vote need not be circulated to the other Commissioners * * * unless it explains the reason for the vote. A copy of the clearance memorandum * * * shall be sent to each Commissioner * * *."

as a body. Moreover, such a procedure is invalid because not published in the Federal Register.

Although there is little federal authority,[9] the state courts universally require that official action of state commissioners,[10] town counsels,[11] county boards,[12] school

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[9]The Federal Communications Commission justified its notation voting procedure in the disposition of *interlocutory* matters: "Throughout the existence of the Commission, it has been the consistent practice with respect to interlocutory matters requiring disposition before the next scheduled meeting of the Commission, to take action by circulation. This practice has been followed in view of the provisions of section 4(j) of the Communications Act of 1934, as amended, which provides that 'the Commission may conduct its proceeding in such manner as will best conduce to the proper dispatch of business and the ends of justice.' * * *." In re Applications of Jackson Broadcasting Co., 13 Fed. Comm. 72, 3a Ad. L. (Pike and Fischer) 48C.15-1 (F.C.C. 1948).

Congress has had notice from time to time of the notation voting procedure of various agencies. Notation voting within the divisions of the Interstate Commerce Commission is described in the monograph of the Attorney General's Committee on Administrative Procedure, Part 11, page 36 (1941), Sen. Doc. No. 10, 77th Cong. 1st Sess. See also *The Report on Practices and Procedures of Governmental Control* by the Board of Investigation and Research, House Doc. No. 678, 78th Cong. 2nd Sess. 1944, page 194. Potter v. United States, 1883, 107 U. S. 126, 1 S. Ct. 524, 27 L. Ed. 330; Smith v. United States, 1898, 170 U. S. 372, 18 S. Ct. 626, 42 L. Ed. 1074; Lytle v. Arkansas, 1850, 50 U. S. 314, 13 L. Ed. 153.

[10]E.g., Webster v. Texas & Pacific Motor Transport Co., 1942, 140 Tex. 131, 166 S.W.2d 75; (Texas Railroad Commission); State v. Union Light, Heat & Power Co., 1921, 47 N. D. 492, 182 N.W. 589 (State Railroad Commission); Schwaabeck v. People, 1890, 15 Colo. 64, 24 P. 575 (State Board); 42 AM. JUR. *Public Administrative Law* §74 (1942). But see, Southern Calif. Jockey Club v. California Horse Racing Board, 1950, 36 Cal.2d 167, 223 P.2d 1; Erkman v. Civil Service Comm. of Provo City, 1948, 114 Utah 228, 198 P.2d 238.

[11]Murphy v. City of Albian, 1892, 22 Ore. 106, 29 P. 353; Pennsylvania R. v. Montgomery County Pass. Ry. Co., 1895, 165 Pa. 62, 31 A. 468; City of Floydada v. Gilliam, Tex.Civ. App., 1937, 111 S.W.2d 761; King v. Guerra, Tex. Civ. App., 1927, 1 S.W.2d 373.

boards,"[9] church trustees,"[10] and corporation boards of directors"[11] must be conducted in formal meetings attended by the necessary quorum. Here each side professes to see in 17(3) of the ICC Act language which sustains its position. Plaintiffs cite the statement that "a majority of the Commission [or] of a division * * * shall constitute a *quorum* for the transaction of business" as clearly indicating that a meeting at which the members are physically present with an opportunity to deliberate, exchange views, persuade or be persuaded by the force of argument and ultimately decide and pursue a jointly reached course of action. But on the other hand, §17(3) provides that "the Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business to the ends of justice * * *."

We think that notation voting may be selected by the Commission as a proper manner of dispatching its business. *When* a meeting of the Commissioners assembled together is held, of course, as the Act specified, a majority shall constitute a quorum. But in view of the broad grant to the Commission of authority to control its proceedings, it may select this type of voting

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[9]Paola & Fall River Ry. Co. v. Commissioners of Anderson County, 1876, 16 Kan. 302.

[10]Pattawatomie County v. Shelton, 1910, 26 Okla. 229, 109 P. 67; Honaker v. Board of Education, 1896, 42 W. Va. 170, 24 S.E. 544; McNolty v. Board of School Directors, 1899, 102 Wisc. 261, 78 N.W. 439; but see, School District No. 25 v. Stone, Colo. App., 1900, 59 P. 885, 887.

[11]Thompson v. West, 1909, 59 Neb. 677, 82 N.W. 13; Nason v. Directors of Poor for Erie County, 1889, 126 Pa. 445, 17 A. 616.

[12]13 Am. Jur., *Corporations* §948.

procedure as an aid in dealing with its tremendous workload.

The statute does not specifically provide that administrative action be taken concurrently by the deciding members in a formal meeting and we decline to impose such requirement.

Nor is the procedure of notation voting rendered a nullity because not published in the Federal Register. The minute authorizing it is recorded in the official record of the Commission although never published in the Federal Register. We think that the procedure falls within one of the specific exemptions from the requirement of publication. The statute exempts "any matter relating solely to the internal management of an agency." §3(a), Adm. Proc. Act, 5 USCA §1002. The last sentence of §3(a) gives meaning to the exemption. "No person shall in any manner be required to resort to organization or procedure not so published." 5 USCA 1002(a). Obviously the procedure is solely a matter of internal procedure within the Commission. It does not purport to inform parties of the procedure which is to be taken for the presentation of matters to the Commission. It is not designed for the guidance of public because it in no way affects any steps which interested parties must take or not take in order to obtain, or review, action by the Commission. As the court in Foreman & Clark, Inc. v. National Labor Relations Board, 9 Cir., 1954, 215 F. 2d 396 at 410, cert. denied 348 U. S. 887, 75 S. Ct. 207, 99 L. Ed. 697, stated: "the clear purpose of section 3(a) * * * is to provide a *shield* for a petitioner before * * * [an] agency to protect him from being penalized for failing to resort to unpublished methods of procedure. It is not a *sword* by

which a petitioner can strike down the agency's order on the ground that the agency *has not authorized itself* to issue that type of order, by publishing a statement in the Federal Register!" Thus, the procedure of notation voting, otherwise valid, is not rendered invalid because it was not published in the Federal Register."

C. Lack of Findings in Order Denying Petition for Reconsideration.

The Commission denied the petition for reconsideration in April 1959 "* * * for the reason that the findings of the Commission are in accordance with the evidence in the applicable law." Plaintiffs contend that with this conclusion and nothing more there is a lack of the basic or essential findings required to support the Commission's order. Amarillo-Borger Express v. United States, N.D.-Tex., 1956, 138 F. Supp. 411 (3-judge); appeal dismissed as moot, 352 U. S. 1028, 77 S. Ct. 594, 1 L. Ed. 2d 598; Dixie Carriers v. United States, S.D. Tex., 1956, 143 F. Supp. 844 (3-judge), appeal dismissed is moot, 355 U. S. 179, 78 S. Ct. 258, 259; 2 L. Ed. 2d 186. The Administrative Procedure Act, 5 USCA §1007(b) requires a statement of findings and conclusions "as well as the reasons or basis therefor." The *Amarillo-Borger* and *Dixie Carriers cases* involve orders entered "for good cause appearing" which vacated and overruled existing Commission orders suspending proposed rates. There were no basic findings and conclusions or reasons therefor to support the order overruling the prior controlling orders except

"Cf. Columbia Research Corp. v. Schaffer, 2 Cir., 1958, 256 F.2d 677; G. J. Howard Co. v. Cassidy, E.D.N.Y., 1958, 162 F.Supp. 568, 574; Pinkus v. Reilly, D.N.J., 1957, 157 F.Supp. 548.

the cryptic phrase "good cause appearing." The court held: "The Commission may, as any other body, have the right to change its mind, but its action must demonstrate the 'reasons or basis therefor'." Amarillo-Borger Express v. United States, supra, 138 F. Supp. 411 at 420. The Administrative Procedure Act does not require that detailed findings with supporting reasons previously made and adhered to by the Commission be reiterated after each attack. The statement by the Commission that the "findings of the Commission [are] in accordance with the evidence and the applicable law" is obviously a statement that the Commission is standing behind the original detailed and articulate findings and conclusions. The law requires no more.

D. Use of Attorney-Advisers

Plaintiffs contend that the Commissioners used attorney advisers, who were not qualified as APA hearing examiners, to review the record of the proceedings conducted by the Hearing Examiner (together with the exceptions and replies to the Examiner's report) and make recommendations—which were never served upon the parties—to aid the Commissioners in reaching their decisions. This was, they urge, especially harmful in this case since the final report rejected the recommendations of the Hearing Examiner. The Commission, although contending that the issues were not raised before the Commission and should not properly be considered by this court, United States v. Tucker Truck Lines, 1952, 344 U. S. 33, 36, 73 S. Ct. 67, 97 L. Ed. 54; Monumental Motor Tours v. United States, D. Md., 1953, 110 F. Supp. 929, 932, does not deny that its practice is to have staff attorney subordinates re-

view the record and make recommendations. These attorney reviewers do not, however, participate in either the investigating or prosecuting functions of the Commission, nor do they take part in the proceedings before the Hearing Examiner.

There are three stages of review by the attorney reviewer. First, taking the Hearing Examiner's report, exceptions and replies, the reviewer prepares a draft of a final report. This report is a recommendation by the adviser who is expected to arrive at his recommendation through his independent study of the record. This report is then turned over to another reviewer who, unfamiliar with the case, goes over the draft of the initial staff reviewer. This re-reviewer may make changes, but if he disagrees with the draft of the initial reviewer then the draft of the initial reviewer must go to the Commission along with the comments of the re-reviewer. The final step, is by the Review Committee composed of three men of the greatest experience on the staff who take a "quick look" at the report before it goes to the division or Commission. The draft and recommendation is then sent to the Commission."

The crux of the plaintiff's argument is that the Administrative Procedure Act applies to the "Interme-

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"The Hoover Commission commented upon such a review. Legal Services and Procedure, March 1935, by the Commission on Organization of the Executive Branch of the Government, at page 202: "In some agencies like the Interstate Commerce Commission, moreover, the record made by the hearing examiner is often subject to further review by other officers who have not heard the evidence, before the record is submitted to the agency for final decision. This practice tends to weaken the administrative process by diminishing the responsibility and status of the officer who conducts the hearing."

diate review" stage to the same extent that it applies to proceedings before the Hearing Examiner. Wong Yang Sung v. McGrath, 1950, 339 U. S. 33, 70 S. Ct. 445, 94 L. Ed. 616; Riss & Co. v. United States, W.D. Mo., 1950, 96 F. Supp. 452, reversed, 1951, 341 U. S. 907, 71 S. Ct. 607, 95 L. Ed. 1345. Specifically, plaintiffs argue, review of evidence in making of recommendations can only be done by Hearing Examiners qualified under §11 of the Administrative Procedure Act, and those recommendations must be served upon the parties who must be given an opportunity to file exceptions to them. The Commission vigorously defends the use of the attorney-reviewers as necessary and essential for effective staff assistance in the internal decisional process of the Commission. Relying mainly on cases[*] decided before the enactment of the Administrative Procedure Act, the Commission contends that the Administrative Procedure Act was not intended to cut off such effective staff assistance.

Plaintiff's argument that the staff review violates the Administrative Procedure Act is based on §7[**] relating to the qualifications of the individual who acts and §8(b)[***] relating to the decisions rendered. But §7

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[*]Morgan v. United States, 1936, 298 U. S. 468, 56 S. Ct. 906, 80 L. Ed. 1288; Morgan v. United States, 1938, 304 U. S. 1, 18, 58 S. Ct. 773, 999, 82 L. Ed. 1129; United States v. Morgan, 1941, 313 U. S. 409, 422, 61 S. Ct. 999, 85 L. Ed. 1429; Norris & Hirschberg v. SEC, D. C. Cir., 1947, 163 F. 2d 689, 693, cert. denied, 333 U. S. 867, —S. Ct.—, 92 L. Ed. 1145.

[**]"In hearings * * * conducted pursuant to this section—

"(a) There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided * * *." 5 USCA §1006(a).

[***]"In cases in which a hearing is required to be considered

provides that an examiner qualified under the Act "shall *preside at the taking of evidence.*" Obviously, the purpose was to govern the qualifications of the individual conducting the hearing, ruling on the admissibility of evidence, and charged with the responsibility of making the record and, where done, the initial decision. It would be difficult to read the language of §7 to include staff assistants who review and make recommendations to aid the Commission in their study of the record of proceedings conducted by the Examiner."

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in conformity with section 1006 * * *—

* * *

"(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers, the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all of the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, release, or denial thereof." 5 USCA §1007(b).

"The use of staff assistants in making recommendations on the record was sanctioned before the passage of the Administrative Procedure Act. See note 28, supra. When Congress undertook to regulate internal agency staff collaborations it did so specifically. In §5c of the Act, Congress specifically prohibited consultation between staff members engaged in investigative and prosecuting functions of an agency with those participating in the adjudicatory function of an agency:

> "No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended

The applicable part of §8 provides that before a "decision upon agency review of the *decision* of subordinate officers, the parties shall be afforded a reasonable opportunity to submit * * * (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers * * *." Further, "[a]ll decisions (including initial, recommended, or tentative decisions) shall become part of the record * * *." The contention of the plaintiffs apparently is that any staff recommendation after re-

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decision, or agency review * * * except as witness or counsel in public proceedings." 5 USCA §1004(c).

The *Attorney General's Manual on the Administrative Procedure Act* 1947, a document of importance in the development of the Administrative Procedure Act, pointed out the need for staff assistance, but also the essential need to separate functions to insure fair and impartial hearings: "The expertise of an administrative agency is not limited to the heads of the agency; it includes also the staff of specialists through whom and with whom assistance most of the agency's functions are carried on. The issues in adjudicatory cases, while frequently less complex and with narrower policy implication than are often involved in rule making, present in many cases difficult questions of law and policy. * * * In determining such issues, agency heads have consulted with their principal advisers and specialists. Indeed, it is clearly in the public interest that they continue to do so. Section 5(c) does not purport to isolate the agency head from their staff. Rather, in the interest of fair procedure, it merely excludes from any such participation in the decision of a case those employees of the agency who have had such previous participation in an adversary capacity in that or a factually related case that they say he "disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions." Attorney General's Manual at 56-57 (1947).

It is significant that Congress in two statutes subsequent to the Administrative Procedure Act has specifically provided for a separate opinion and review section for the Federal Communications Commissions (see 47 USCA §§155(c), 409) and for individual review by a legal assistant for each member of the National Labor Relations Board (see 29 USCA §154(a)).

view of the record of the Hearing Examiner, exceptions and replies, is either a recommended or a tentative decision within the meaning of the section. Reference to other sections, however, indicates that what was contemplated by a "recommended decision" was one made by a Hearing Examiner when the agency itself makes the initial decision without having presided at the taking of evidence. This would also include an initial decision made by a Division under the delegation procedure and in which no hearings are held before an Examiner. This would also include those in which the Examiner's proposed order may become final under §8(a). Section 8(a) provides that decisions or recommended decisions of the Examiner shall become final in the absence of appeal to the agency by the parties or reconsideration on motion of the agency itself."

Similarly, §17(5) of the Interstate Commerce Act provides that findings or orders of an individual commissioner or board, shall in the absence of appeal, become the order of the full Commission." In adjudicatory cases a "tentative decision" is substantlly equivalent to a "recommended decision." More often it is regarded as one issued by an agency in rule-making or

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"5 USCA §1007(a): "* * * Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency."

"49 USCA §17(5). Staff recomendations on the other hand have no such finality until they have actually been adopted by the Commission or by division. To read §8(b) as requiring that all staff memoranda be subjected to exceptions and replies and be placed in the record would effectively destroy their usefulness in aiding the individual commissioners in the decisional process.

initial licensing procedure in which no recommended or initial decision by the Hearing Examiner is involved. Or, as the term implies, it may be one in which the agency or the hearing officer couches the order in terms which will be followed unless the parties show good reason to the contrary.

The distinction between the function of a Hearing Examiner and the Commission (or a division of it) must be kept carefully in mind. Much is committed to the Examiner and the aim of the APA was to give him a position of judicial independence and disinterestedness. His findings and conclusions, or recommended action, will have great significance. But the final decision is that of the Commission. The Commission is not, as would be the case of a court reviewing a trial judge's non-jury decision or the action of an administrative agency under clearly erroneous or substantial evidence concepts, bound by the Examiner's decision. It is, of course, a relevant and important part of the administrative record. Universal Camera Corp. v. NLRB, 1951, 340 U. S. 474, 492-497, 71 S. Ct. 456, 95 L. Ed. 456, 469-472. But the final decision must be that of the Commission. Consequently it is not a mere matter of the Commission's reviewing the Examiner's proposed report to see whether it is supported by sufficient evidence. That means that in the performance of this duty of ultimate responsibility the Commission and its members may properly call on staff assistance in satisfying the almost insuperable demands on this personal institutional accountability.

Congress is aware of the tremendous volume of business which is the ultimate responsibility of the Commission, and hence the Commissioners. The APA was

intended to reach the vice of infection of the adjudicatory body by the partisan views of those having investigatory and prosecuting duties. Congress did not mean to leave this small group of Commissioners bereft of staff assistance in the assimilation of the great flood of formal cases requiring decision. The decision is still that of the Commissioners. Each bears full legal and personal accountability for that which bears his name or concurrence. The system requires a full public report of reasons and conclusions. With these safeguards Congress deemed the question of the identity and actions of staff assistants to be matters beyond question by the parties.

II.

Substantiality of the Evidence

Plaintiffs vigorously attack the granting of both applications on the grounds that they are not bottomed and supported by substantial evidence viewing the record as a whole. Universal Camera Corp. v. NLRB, 1951, 340 U. S. 474, 71 S. Ct. 456, 95 L. Ed. 456. Giving color to this argument is the fact that the Commission, while adopting the many factual statements of the Hearing Examiner, rejected the recommendations of the Examiner and reached a directly contrary result. In assaying the substantiality of the evidence supporting the Commission's action, ours is the limited task of determining whether the conclusion of the Commission "finds support in the record as a whole * * * 'even though the court would justifiably have made a different choice had the matter been before it de novo'." NLRB v. Fant Milling Co., 1959, 360 U. S. 301, 309, 79 S. Ct. 1179, 3 L. Ed. 2d 1243; United States v. Pierce

Auto Freight Lines, 1946, 327 U. S. 515, 66 S. Ct. 687, 90 L. Ed. 821. §10(e), Administrative Procedure Act, 5 USCA §1009(e). If the Commission has made adequate findings which are in turn supported by substantial evidence, viewed in the light that the record in its entirety furnishes, a reviewing court may not set the order aside even though the court may disagree with ultimate findings of the Commission. Interstate Commerce Commission v. Union Pacific Railroad Co., 1912, 222 U. S. 541, 547, 32 S. Ct. 108, 56 L. Ed. 308; Rochester Telephone Corp. v. United States, 1939, 307 U. S. 125, 139-140, 59 S. Ct. 754, 83 L. Ed. 1147; Universal Camera Corp. v. NLRB, supra.

It is the duty of the Commission to determine the question of public convenience and necessity—a judgment as to the public interest—in an application for additional transportation facilities under §207(a)." Interstate Commerce Commission v. Parker, 1945, 326 U. S. 60, 65 S. Ct. 1490, 89 L. Ed. 2051.

Here the Commission made its findings of public convenience and necessity requiring the granting of the two applications based largely on its judgment that the existing service was unsatisfactory and that the proposed service was feasible and appropriate. The Commission's basic conclusion—which the plain-

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"§207(a) of the Interstate Commerce Act, 49 USCA §307 (a), provides: "* * * a certificate (of public convenience and necessity) shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed * * * and that the proposed service * * * is or *will be* required by the present or *future* public convenience and necessity; otherwise such application shall be denied * * *." (Emphasis supplied.)

tiffs here vigorously contest—is that "the existing service of Herrin and TSC between Houston and New Orleans is not reasonably adequate to meet the present and future requirements of the public for expeditious motor service * * *." ICC Report, supra, 77 MCC at 677. "[Herrin and TSC] have demonstrated * * * that they cannot be depended upon to provide the type of service of which they are capable, except when faced with an imminent threat of additional competition." ICC Report, supra, 77 MCC at 666. These conclusions were based largely on complaints of shippers which complaints the Commission stated "characterize the over-all service as undependable." Such complaints fall into two general categories, (1) delay in picking up shipments and delay in making local deliveries and (2) excessive and irregular transit times.

It is inappropriate and unnecessary for us to recite the evidence of the individual witnesses. Over 100 persons support Strickland's application and 40 shippers or receivers support the application of Southern-Plaza. It is sufficient to give a general brief description of the testimony.

Witnesses recited their experience in the years 1954, 1955 and 1956 with respect to unsatisfactory pickup service by the existing carriers. Some of the shippers testified that because of delayed pickup service and their need for prompt shipment, they were forced to deliver shipments to the carrier's docks. Others testifying to the unsatisfactory service they had received commented upon the noticeable improvement after the filing of the applications by Strickland and Southern-Plaza. The complaints which the Commission was entitled to credit were largely that the particular carrier

failed to pick up shipments on the same day it was requested to do so. In the same vein, some witnesses testified that they found it necessary to pick up their incoming shipments at the carrier's dock if they wanted them the same day the shipment arrived.

The objection which the Board characterized as the "most serious complaint against existing service" was that relating to excessive and irregular transit time. Although the Commission considered some of the delay excusable because of week-end shutdowns, the Commission stated that from the past experience of many of the shippers it was clear that they had been subjected to a substantial amount of mediocre and poor service." Herrin and TSC countered that they held out and advertised 2-day service as well as overnight service between Houston and New Orleans. Futher, as shown in the Examiner's report, in excess of 90% of the shipments handled by Herrin during August 1955 (immediately prior to the hearings) were accorded 2-day or better service. But the carriers hold themselves out to furnish expedited service also and too many shipments, the Commission found, were given inadequate or slow service.

Another facet of the "transient time" problem is a complaint by some of the supporting shippers, from

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"'Recapitulating certain figures tabulated by the examiner * * * it is noted that of 892 shipments handled by Herrin and TSC for the supporting shippers from Houston to Baton Rouge, only 379, or about 35 percent, were afforded 1-day service, 207 were afforded 2-day service, and 106 or about 15 percent required 3 days or more for delivery. Of 616 shipments handled by Herrin and TSC for the supporting shippers from Houston to New Orleans, 166 or about 27 percent were afforded 1-day service, 391 were afforded 2-day service, and 59 required 3 or more days." ICC Report, 77 MCC 655, 664.

San Antonio, of delay incidental to the interchange of freight at Houston. Specific instances of such delay are recited in the evidence.

The evidence adequately supports the Commission's ultimate finding. It is the conventional type of evidence usually submitted to the Commission in proceedings of this kind calling for the evaluation of many variable factors and the exercise of sound judgment to reach an equitable and fair decision. The evidence adduced supports the statements of underlying reasons made by the Commission. And the evidence showing a noticeable increase in satisfactory service shortly prior to the hearings on these applications further supports the basic conclusion of the Commission on the need for additional service. If the prospect of additional competition brings about such beneficial results, surely the Commission in the exercise of its informed judgment could find that the additional carriers would give a healthy climate of controllable competition without being destructive to the position of the existing carriers.

The applicants' proposed service contemplates service between all points which they now serve, on the one hand, and on the other, New Orleans and points between Houston and New Orleans. The applicants both propose regularly scheduled overnight service between Houston and New Orleans. Strickland also proposes a number of schedules between Houston and the principal intermediate points and plans to have terminals at those intermediate points. It plans to have service between those small intermediate points provided generally by so-called peddle runs. The Commission concluded "the schedule set up by applicant governing

their proposed operations between Houston and New Orleans are * * * entirely reasonable; and we have no basis to doubt that either applicant can, or would, maintain the service proposed if the instant applications are granted."

The Commission concluded that the amount of additional service resulting from the granting of the applications would not endanger the existing services of Herrin and TSC. This was based upon its informed judgment that the amount of traffic available, based in part on figures submitted by Herrin and TSC,[7] is or will be sufficient to support the additional operation of both applicants between Houston and New Orleans."

The Commission granted Strickland the "northern" route and Southern-Plaza, the "southern" route. Thus Baton Rouge will be served by Strickland alone and Lafayette will be served by Southern-Plaza alone. There will be no added competition in the local service between New Orleans and Baton Rouge and between New Orleans and Lafayette and points intermediate

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[7]Figures submitted by Herrin and TSC indicated a daily average tonnage of 880,000 pounds handled between Houston and New Orleans, 110,000 pounds between Beaumont and New Orleans, 117,000 pounds between Houston and Lake Charles, 97,000 pounds between Houston and Baton Rouge, and 141,000 pounds between Houston and Lafayette.

[8]This is the point on which one commissioner dissented. 77 MCC 655, 670-71: "Considering * * * the fact that no need has been shown for greater quantum, as distinguished from quality, of service, I am not convinced that the record justifies the granting of the two applications. To double the number of direct single-line carriers between the terminal here involved and dilute the available traffic possibly to such a considerable extent that it might eventually result in deteriorated service as well as produce unsound transportation policy. I believe, therefore, that if any authority is to be granted, it should be to one applicant only * * *."

thereto since the Commission imposed restrictions to protect such existing local services."

Complaint of Intervenors Central and East Texas

These two intervenors operate between Beaumont-Orange and Houston although East Texas has a somewhat restricted authority. They complain that the final order authorizes two new services, "(1) between Orange, Beaumont and Houston and (2) between Orange, Beaumont and other points on U. S. Highway 90 intermediate to Orange and Houston, on the one hand, and, on the other, San Antonio, Fort Worth, Dallas, St. Louis, Chicago, and other points now authorized to be served direct by Strickland and Southern-Plaza." They further assert that there is no evidence that public convenience and necessity requires such services, nor are there requisite findings in the report to support those conclusions. They point to the "manifest inconsistency within the report as between involved local services in Louisiana and local services in Texas, and as between proposed off-route services and proposed through services from Beaumont and Orange to the west and north, and vice versa."

There does not seem to be any serious dispute between the intervenors and the applicants concerning what the testimony was before the Hearing Examiner with respect to truck service to and from Orange and Beaumont. The testimony of the witnesses to which we have been referred deals in every case, except one, R.

"Service at Baton Rouge was restricted to traffic moving to or from points west of the Louisiana-Texas state line. Service at Lafayette and intermediate points between Lafayette and New Orleans was restricted to traffic moving to or from points west of the Louisiana-Texas state line.

W. Smith and Company," with shipments between Orange and Beaumont on the one hand, and points in Louisiana on the other. It may be fairly said that there was no showing of inadequate service from Orange and Beaumont, on the one hand, and Houston on the other. Therefore, the question is resolved into a question of law. That is, must there be adequate evidence of public convenience and necessity for additional service between Beaumont-Orange and Houston to support the specific service award here challenged?

Strickland already has authority to carry from Houston to Beaumont, but not in the reverse direction. Southern-Plaza had no authority to carry between Houston and Beaumont or Orange or reverse. Strickland and Southern-Plaza urged that the question is merely whether "tacking" should be allowed. The "tacking" argument would apply to Strickland's Houston to Beaumont service. And so far as points west or north of Houston, such as San Antonio, Ft. Worth, Dallas, St. Louis, Chicago, which Strickland and Southern-Plaza were previously authorized to serve the new authority is properly regarded as "tacking."[4] The Commission's order is adequate as to evidence and findings to sustain the order with respect to such transportation. But it is incorrect to attempt to justify new service between Beaumont-Orange and Houston on the principle of "tacking." Whether a

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[3] Mr. Posey of E. W. Smith and Company testified that he had shipments from Houston to Beaumont, New Orleans, and points further east. On cross examination Mr. Posey said that he had never had any great difficulty with Herrin to Beaumont, and that he had never used TSC to Beaumont.

[4] E.g., M. I. O'Boyle & Son v. Interstate Commerce Comm., D.C. Cir., 1958, 206 F.2d 473, 475; Century-Matthews Motor Freight v. Thrun, 8 Cir., 1949, 173 F.2d 454, 456.

grant of authority between Houston and New Orleans should include authority for local service between Beaumont-Orange and Houston or shipments destined for or originating from such points is obviously a question on which evidence on the need for that particular service must be adduced.

This means that service between Beaumont-Orange and Houston (and intermediate points) was required to be supported by evidence of public convenience and necessity. This extends to shipments originating in Houston or beyond destined to move through Houston to Beaumont-Orange or any points intermediary to Houston and Beaumont-Orange as well as any return shipments going in the reverse direction.

Intervenors Central and East Texas, rely on Hudson Transit Lines v. United States, S.D.N.Y., 1948, 82 F. Supp. 153, affirmed 338 U. S. 802, 70 S. Ct. 59, 94 L. Ed. 485, and Tucker Truck Lines v. United States, E.D. Mo., 1953, 115 F. Supp. 647. Both of these cases involved the setting aside of a certificate of public convenience and necessity which authorized service between intermediate points within the scope of broader rights because of the failure to show the necessity from that particular localized service. So much of the certificate authorizing the service between a particular intermediate point that was not supported by substantial evidence on necessity for the service was set aside."

"In Hudson Transit Line v. United States, supra, Adirondack Transit Lines had been given a certificate with respect to long hauls between Paramus, New Jersey, and Monroe, New York, as well as short haul or commuter service between New York City and intermediate points between Paramus, New Jersey, and Monroe. The court set aside so much of the certificate as dealt with the short haul service, on the

In view of the persuasiveness of these two cases, and the obvious inapplicability of the "tacking" cases cited by applicants, so much of the certificate granting authority for new service between Beaumont-Orange and Houston must be set aside. This will not affect the existing authority of Strickland to operate from Houston to Beaumont, but not in the reverse direction."

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grounds that substantial evidence had not been presented and necessity for this phase of the service.

In Tucker Truck Lines v. United States, supra, Pemiscot truck lines was granted authority to run truck service between St. Louis and Memphis and between Memphis and Sikeston, Missouri, and Sikeston, Missouri and St. Louis. Sikeston was only one of the intermediate points between Memphis and St. Louis. The only portion of the certificate attacked was that part which dealt with the authorization of new service between Sikeston and St. Louis. The court held: "There was no evidence before the Commission to sustain the need for granting additional service between St. Louis, Missouri and Sikeston, Missouri, nor was there showing that the present service was inadequate. While the routes over which Pemiscot Motor Freight operated required it to pass through Sikeston in order to render service to other points farther south granted in the certificate, this in the court's opinion is no justification for granting it authority to serve Sikeston." 115 F.Supp. at 649.

"As the case has to be remanded to the Commission with respect to this phase, we do not undertake to set this forth in terms having the precision of a certificate. But under our holding, except for Strickland's existing authority, the applicants will not be permitted to engage in the following transportation:

(1) Service from or through Houston destined to Beaumont or any point between Houston and Beaumont, or in the reverse direction,

(2) service from or through Houston destined to Orange or any point between Houston and Orange, or in the reverse direction,

(3) service from points east of Orange-Beaumont destined to any *intermediate point between* Orange-Beaumont and Houston, or in the reverse direction. (This would not restrict, for example, *a shipment from Baton Rouge to Orange or Beaumont, or the reverse.*)

Miscellaneous Objections

There is no merit to the contention that the Commission failed to consider the adequacy of rail service or the impact of these grants upon such carriers. "Many of the supporting shippers are now utilizing rail service to some extent, but all prefer motor service for expeditious handling of their smaller shipments. They complain generally of the service received from existing carriers, both motor and rail." ICC report, supra, 77 MCC 655, 660.

Plaintiffs' contention that the Commission failed to make findings in terms of the national transportation policy[*] has no merit.

The report of the Commission is a detailed, careful, and articulate exposition of its judgment as to the adequacy of the existing services, the present and probable future need for additional services, the desirability of such additional services as a result of a controlled competition, and its judgment as to the effect the additional service will have on existing carriers. Unless, as in cases like Pacific Island Tariff Bureau v. United States, (D. Ore.-3 judge), 1955, 129 F. Supp. 472, and Schaeffer Transportation Co. v. United States, 1957, 355 U. S. 83, 78 S. Ct. 173, 2 L. Ed. 2d 117, where special problems exist, it would be more tautology for the Commission to repeat formal declarations in terms of the national transportation policy. Obviously the entire report with its many basic findings clearly demonstrates that the Commission applied "its familiarity with transportation problems to these conflicting con-

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[*]The national transportation policy is set forth in 49 USCA, preceding §§1, 301, 901 & 1001.

siderations." American Trucking Association, Inc. v. United States, 1953, 344 U. S. 298, 73 S. Ct. 307, 316, 97 L. Ed. 337.

Finally, the Commission did not abuse its discretion in denying the petition for rehearing. United States v. Pierce Auto Lines, 1946, 327 U. S. 515, 534-536, 66 S. Ct. 687, 90 L. Ed. 821; Interstate Commerce Commission v. Jersey City, 1944, 322 U. S. 503, 514-518, 64 S. Ct. 1129, 88 L. Ed. 1420.

Accordingly, the order is affirmed in part and set aside in part. Insofar as the order is set aside, the matter is remanded to the Commission for further consistent proceedings.

AFFIRMED IN PART, REMANDED IN PART.

APPENDIX "I"

INTERSTATE COMMERCE COMMISSION

No. MC-59680 (Sub-No. 117)[1]

STRICKLAND TRANSPORTATION CO., INC., EXTENSION—LOUISIANA ROUTES

Decided October 14, 1958

In Nos. MC-59680 (Sub-No. 117) and MC-10928 (Sub-No. 26), public convenience and necessity found to require operation by the respective applicants as common carriers by motor vehicle of general commodities, with exceptions, between Houston, Tex., and New Orleans, La., over described regular routes, serving all intermediate points, subject to certain restrictions. Issuance of certificates approved upon compliance by applicants with certain conditions, and applications in all other respects denied.

Ewell H. Muse, Jr., for applicant in No. MC-59680 (Sub-No. 117), and for intervenor in opposition in No. MC-10928 (Sub-No. 26).

Clarence D. Todd, Charles W. Singer, Dale C. Dillon, and *Charles F. Riddle* for applicant in No. MC-10928

[1] This report also embraces No. MC-10928 (Sub-No. 26), Southern-Plaza Express, Inc., Extension—Louisiana Routes.

(Sub-No. 26), and for intervener in opposition in No. MC-59680 (Sub-No. 117).

M. Ward Bailey, Walter Caven, Louis I. Dailey, Leroy Hallman, John Paul Jones, James W. Nisbet, Carl L. Phinney, Ralph W. Pulley, Jr., Philip Robinson, Reagan Sayers, Scott P. Sayers, Herbert L. Smith, James D. Smullen, Ed White, and *R. F. Williams* for protestants and interveners in one or both of the applications.

REPORT OF THE COMMISSION

BY THE COMMISSION:

These proceedings were heard in part on a consolidated record and were the subject of a single report of the examiner to which were appended separate recommended orders proposing the denial of both applications. Separate exceptions were filed by the respective applicants to the orders recommended by the examiner, and a joint reply was filed by the opposing carriers. Our conclusions differ from those recommended.

By application in No. MC-59680 (Sub-No. 117), filed June 21, 1954, as amended, Strickland Transportation Co., Inc., hereinafter called Strickland, of Dallas, Tex., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities, except those of unusual value, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment, between

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Together with No. MC-10928 (Sub-No. 21), which duplicates the authority sought in No. MC-10928 (Sub-No. 26), and which has since been dismissed.

Houston, Tex., and New Orleans, La., (1) over U. S. Highway 90, through Beaumont, Tex., and Lake Charles, Lafayette, and Houma, La., and (2) over U. S. Highways 90, 165, 190, and 61, through Beaumont, Lake Charles, Opelousas, La., and Baton Rouge, La. The two routes are identical between Houston and Iowa, La., at which point they separate and converge upon New Orleans from both the south and north. Authority is sought to serve all intermediate points on each route and off-route points within 25 miles of New Orleans and Orange, Tex., and within 15 miles of Baton Rouge and Lake Charles.

By application in No. MC-10928 (Sub-No. 26), filed September 26, 1955, Southern-Plaza Express, Inc., hereinafter called Southern-Plaza, of St. Louis, Mo., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities, with the exceptions noted above, between Houston and New Orleans over U.S. Highway 90 (route 1, described above), serving all intermediate points and off-route points within 10 miles of New Orleans, within 12 miles of Lake Charles, and within the Houston commercial zone as defined by the Commission.

The two applications have been the subject of extensive hearings, and a voluminous record has been compiled. The proceedings mark the second major undertaking, within a decade, to establish a need for additional motor transportation facilities between the points and over the routes involved. By similar applications filed in August 1947 Strickland, Southern Express, Inc. (predecessor to Southern-Plaza), and Ala-

mo Motor Lines, which is a protestant in the instant proceedings, sought authority to extend their existing lines easterly from Houston into New Orleans. The basic issues presented then were substantially the same as those here. The 1947 applications were also the subject of extensive hearings and a voluminous record. On that record former division 5 by its report of January 15, 1952, found that public convenience and necessity required operation by the 3 applicants between Houston and New Orleans over U. S. Highway 90, serving all intermediate points, with some variation as between the separate applicants, and certain off-route points; but in its report on reconsideration, *Southern Exp., Inc., Common Carrier Application,* 62 M. C. C. 35, decided June 10, 1953, we reversed the findings of division 5 and denied all 3 applications. Petitions for reconsideration and further hearing were denied on June 7, 1954, and the instant applications were filed shortly thereafter. Although the Southern-Plaza application here considered was not filed until September 26, 1955, it was preceded by another application, No. MC-10928 (Sub-No. 21), filed June 28, 1954, in which a substantially similar proposal was advanced, and which was dismissed as being duplicative of, and included in, the application here considered.

Both of the present applicants are now engaged in operation as common carriers by motor vehicle of general freight over regular routes extending between points in several States. Both serve a number of points in Texas, particularly those within a triangular shaped area with Dallas and Fort Worth at the apex and with San Antonio and Houston at the two corners of the base. Both operate between points in that area and

Chicago, with Strickland serving such intermediate points as Shreveport, La., Little Rock, Ark., Memphis, Tenn., and St. Louis, and with Southern-Plaza serving such intermediate points as Oklahoma City and Tulsa, Okla., Kansas City, Mo., and St. Louis. Strickland holds authority to operate from Houston to Beaumont, over the route here involved, but not in the reverse direction. Southern-Plaza operates a line extending westerly from San Antonio as far as El Paso, Tex.

The extension between Houston and New Orleans here sought would be operated by both Strickland and Southern-Plaza in conjunction with all presently authorized routes, and hence the instant proposals may be said to contemplate service between all points now served, on the one hand, and, on the other, New Orleans and points in Texas and Louisiana intermediate to Houston and New Orleans. In providing service to the latter points, however, it would be necessary that all traffic be funneled through Houston, which would require a substantial amount of circuity of operation except with respect to movements between Texas points now served and those Texas and Louisiana points here proposed to be served. Both applicants presently serve San Antonio, Dallas, and Fort Worth, and both operate between such points and Houston. Thus, the granting of the instant applications would permit the establishment of single-line services between the named Texas points, on the one hand, and, on the other, New Orleans and points intermediate to Houston and New Orleans.

The applications are opposed by the rail carriers operating in the affected territory, by a large number

of motor common carriers,[1] and by Gulf Canal Lines, Inc., a water carrier. Many of the opposing motor carriers failed to present evidence as to the nature and extent of their operations; and their interest in the proceedings, if any, cannot be determined from the record. Of those motor and rail carriers which submitted evidence, only a few operate between the points or over either of the routes covered by the applications. The interest of most of the opposing carriers arises from the fact that they now participate with other carriers in joint-line service between points on their lines and points covered by the applications. Those of the opposing motor carriers, the existing operations of which would be duplicated by a grant of the authority here sought are: Herrin Transportation Company and T. S. C. Motor Freight Lines, Inc., hereinafter called Herrin and TSC respectively, both of which operate between Houston and New Orleans over

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[1]Alamo Motor Lines, Baggett Transportation Company, Arkansas Motor Freight Lines, Inc., D. A. Beard Truck Lines Co., Brown Express, Campbell Sixty-Six Express, Inc., Central Freight Lines, Inc., Consolidated Forwarding Co., Inc., Cook Truck Lines, Inc., Couch Motor Lines, Inc., Delta Motor Lines, Inc., East Texas Motor Freight Lines, England Bros. Truck Line, Inc., Galveston Truck Line Corporation, George W. Garig Transfer, Inc., Gillette Motor Transport, Inc., Gordons Transports, Inc., Gulf Coast Express, Inc., D. C. Hall Transport, Inc., Herder Truck Lines, Herrin Transportation Company, Mid-Continent Freight Lines, Inc., Merchants Fast Motor Lines, Inc., Kimbel Lines, Inc., Lee Way Motor Freight, Inc., Miller and Miller Motor Freight Lines, O. S. T. Transportation Co., Pitrie Bros. Transfer, Pic Freight Co., Powell Bros. Truck Lines, Red Ball, Inc., Red Ball Motor Freight, Inc., Rice & Company, Inc., Louis Sase Motor Freight Lines, Southwestern Transportation Company, Sunset Motor Lines, T. S. C. Motor Freight Lines, Inc., Texas Arizona Motor Freight, Inc., Thru Truck Service, Viking Freight Company, Walsh Freight Lines, Inc., Western Truck Lines, Ltd., and Young's Motor Freight Lines.

the routes involved serving all the points sought herein; D. C. Hall Transport, Inc., and Couch Motor Lines, Inc., hereinafter called Hall and Couch, respectively, which operate between Baton Rouge and New Orleans over the northern route described in the Strickland application; George W. Garig Transfer, Inc., which operates between Baton Rouge and New Orleans over routes not here involved; and Louis Saia Motor Freight Lines, which operates between Lafayette, La., and New Orleans, over the southern route described in the applications. Herrin and Hall also operate between Dallas and New Orleans, and Hall also serves Fort Worth. Their lines between such points through De Ridder and Shreveport, are substantially shorter than those which applicants would establish through Houston.

Those of the opposing rail carriers whose lines parallel the routes described in the applications are: The Texas and New Orleans Railroad Company, which operates a line between Houston and New Orleans closely paralleling the southern route described in the applications; the Missouri Pacific Railroad Company, which operates between the same termini over a line closely paralleling the northern route described in the Strickland application; and the Illinois Central Railroad Company, which operates between Baton Rouge and New Orleans over a line paralleling the northern route. Direct rail service is, of course, available between points on the routes here involved and principal Texas points now served by applicants.

The examiner recommended that both of the instant applications be denied, and the report which accompanied his recommended orders contains an exhaustive statement of the pertinent facts of record. There is no

serious dispute as to these facts, but each applicant takes vigorous exception to certain of the conclusions based thereon reached by the examiner, particularly with respect to his appraisal of certain evidence. An examination of the record indicates that, except to the extent hereinafter indicated, the pertinent facts are accurately stated in the examiner's report. In the circumstances, we shall adopt the examiner's statement as our own, and we shall restate or enlarge upon the factual situation only to the extent desirable for an adequate discussion of the issues raised by the exceptions.

Strickland takes specific exception to some 40 findings and conclusions of the examiner, and Southern-Plaza attacks such findings and conclusions in 8 specific respects. The principal contentions raised are: (1) that the examiner gave little, if any, weight to the economic growth of the territory covered by the applications and to the alleged monopolistic position of the carriers now serving the territory, (2) that he erred in finding that the services of existing carriers are reasonably adequate to meet the requirements of the supporting shippers, and (3) that there is no proper basis for the doubts expressed by the examiner that the additional services proposed by the respective applicants, if authorized, would be any more consistent, dependable, or otherwise more adequate than those now provided by existing carriers. In their joint reply the opposing carriers urge that the findings and conclusions of the examiner are abundantly supported by the record, and that the applications should be denied.

Applicants' contentions concerning the importance of the economic growth of the area considered and the

fact that in the face of such growth there has been no substantial change in the competitive situation from a transportation standpoint have, in our opinion, little merit. There can be no doubt that the Gulf Coast area here involved has undergone a substantial increase in industrialization and economic growth since World War II, and that further expansion along such lines may reasonably be expected for some time in the future. Factors of economic growth are, however, important in determining the issues here presented only to the extent that such growth has resulted or may reasonably be expected to result in an increased demand for transportation facilities which the existing carriers cannot meet because they have not kept pace with such increased demand. Similarly, we are not concerned so much with the number of carriers operating between the points involved as we are with the quantum and quality of the overall service provided, and applicants' allegations that Herrin and TSC enjoy a virtual monopoly on motor transportation between Houston and New Orleans is important only to the extent that service to the public may be said to have deteriorated or failed to keep pace with the times as a result of there being a lack of competition between such points. Thus, the economic growth of the area and the alleged monopolistic position of existing carriers are relative matters which are entitled to consideration only insofar as they bear upon the basic issue of whether the existing transportation services are reasonably adequate to meet the transportation requirements of the shipping public in the area.

As shown in the examiner's report, over 100 persons support the authority sought by Strickland, and 40 shippers or receivers support the application of South-

ern-Plaza. Five of the latter shippers also testified in support of the Strickland application. The pertinent evidence presented by these persons is set forth in appendixes I and K of the examiner's report. Many of the supporting shippers are now utilizing rail service to some extent, but all prefer motor service for expeditious handling of their smaller shipments. They complain generally of the service received from existing carriers, both motor and rail. For the most part they do not contend that the existing motor-carrier service is consistently poor, but urge that the ratio between good and poor service is such as to characterize the overall service as undependable. Complaints against existing rail service are concerned primarily with excessive transit time. The complaints against motor service fall into two general categories, (1) delays in picking up shipments at shippers' places of business and in delivering at consignees' places of business, and (2) excessive and irregular elapsed time between pickup and delivery. Most of the supporting shippers express a desire for a consistent motor service of the type proposed; and to many, the element of consistency is of considerable importance even though they may not require expedited service in all instances.

Applicants both propose regularly scheduled overnight service between Houston and New Orleans, in both directions. Strickland also proposes a number of schedules between Houston and principal intermediate points, and between New Orleans and such points. It plans to establish terminals at such intermediate points. Southern-Plaza would operate intermediate-point schedules between New Iberia, La., on the one hand, and, on the other, New Orleans and Houston. Service to and from the small intermediate points will be pro-

vided generally by so-called peddle runs radiating from the terminals, and the transit time on shipments handled to and from such smaller points will be lengthened somewhat, being described as next day, rather than overnight, service. In other words, a shipment dispatched from Houston to one of the smaller points will be delivered to the terminal nearest the destination on the morning following dispatch, and will be delivered at destination some time later in the day. The schedules set up by applicants governing their proposed operations between Houston and New Orleans are, we believe, entirely reasonable; and we have no basis to doubt that either applicant can, or would, maintain the service proposed if the instant applications are granted. The distance between Houston and New Orleans over the northern route through Baton Rouge is 364 miles, and over the southern route through Houma is about 30 miles longer. Strickland's proposed schedules between the termini are based upon the 364-mile figure and call for an elapsed transit time of 11½ hours, at an average speed of less than 32 miles per hour. Southern-Plaza's through schedules between the termini, over the southern route, with a 1-hour layover at New Iberia, contemplate an elapsed transit time of 13½ hours and also may be accomplished by maintaining an average speed of less than 32 miles per hour. There is nothing unusual about these running times and average speeds, considering the nature of the terrain. Herrin has 4 schedules daily between Houston and New Orleans which call for an elapsed running time of about 9.5 hours, and TSC purportedly maintains an elapsed running time of 11 hours between the same points.

Both applicants also propose an expedited service between points on their existing lines, such as San Antonio and Dallas, on the one hand, and New Orleans, on the other. Strickland's proposed schedules between San Antonio and New Orleans, 560 miles, call for an elapsed running time of 19.5 hours, including a 1-hour layover at Houston, and an average speed of less than 32 miles per hour. Its proposed schedules between Dallas and New Orleans, 608 miles, call for an elapsed running time of 19.5 hours, with an average speed of slightly more than 32 miles per hour. Next-day service is possible under these schedules only if shipments are tendered in time for a late afternoon dispatch, in which event they can be delivered to consignees in the afternoon after the late morning arrival at the destination terminal. Southern-Plaza has not submitted specific proposed schedules between San Antonio and Dallas and New Orleans, and there is some question as to the exact nature of its proposal in this respect. It would appear, however, from the contentions raised on exceptions, that it proposes a 2-day service between San Antonio and New Orleans and between Dallas and New Orleans, with somewhat better transit time to and from intermediate points west of New Orleans. Although it is possible to maintain next-day delivery between Dallas, Fort Worth, and San Antonio, on the one hand, and New Orleans, on the other, the likelihood of applicants being able to render such a service regularly and consistently is not as certain or probable as in the case of the proposed service between Houston and New Orleans.

Rail service between the points involved is generally slower than the existing motor services. Since most

of the supporting shippers prefer motor service because of the short transit time experienced, we shall confine our discussion here primarily to the adequacy of the existing motor facilities. The experiences of the supporting shippers with rail service are fully and adequately stated in the examiner's report.

Pickup service.—A number of the supporting shippers complain of the pickup service rendered by existing motor carriers. Most of the complaints are concerned with pickup service at Houston and Dallas, but some refer to service at other points such as New Orleans, Baton Rouge, Beaumont, Orange, and Lake Charles. The complaints are confined generally to situations where the pickup is not made on the same day the carrier is requested to do so. Only one of the supporting shippers, Ceco Steel Products Corporation, of Houston, keeps a record of its pickup requests. It submitted an exhibit indicating that TSC failed to make pickups on the date ordered in the case of 9 out of 15 requests in January 1955; 14 out of 21 requests in February 1955; and 7 out of 20 requests in March 1955. It agrees that the TSC service has been good since July 1955, immediately prior to the hearings herein.

TSC submitted a series of exhibits based upon records maintained at its Houston terminal for several months in 1955. In some instances the data presents a substantially different picture than that presented by the supporting shippers orally, and, as shown in appendix K of the examiner's report, differs in a number of respects from the documentary evidence presented by Ceco Steel Products Corporation. The TSC pickup service at Houston, based on its records, is summarized in appendix L of the examiner's report. It

shows a marked improvement in pickup service during September and October 1955, after the commencement of the hearings on these applications.

A few shippers complain of delayed local deliveries, indicating that they sometimes find it necessary to pick up their incoming shipments at the carriers' docks if they want them the same day they arrive.

Transit time.—The most serious complaint against existing service is that relating to excessive and irregular transit time. Many of the complaining shippers submitted exhibits depicting the transit time experienced in connection with shipments moving between the points involved. Such exhibits do not include all shipments during periods reported, and in a number of instances the opposing carriers submitted similar exhibits depicting the service performed by them on other shipments handled for the same shippers. In summarizing this information in his report, the examiner made certain "corrections" concerning the number of days the shipments were in transit, and applicants take issue with his conclusions in this respect. Most notably, they object to his conclusion that in case of a conflict between a shipper's record of delivery and the carrier's record, the latter should prevail. We cannot accept the general proposition that a carrier's records are accurate and that a shipper's records are not, or that the carrier's records are more likely to be accurate than those of the shipper. However, neither of the applicants point out in their exceptions the specific instances in which the examiner resolved such discrepancies in favor of protestants, and our examination of the record indicates that the number of "corrections" made by the examiner in this respect is not such as

would make any material difference in the conclusions hereinafter reached on the matter of transit time. In any event, the "corrections" made by the examiner definitely favor protestants.

Strickland also objects to the elimination by the examiner of intervening weekends and holidays in his computation of transit time. This appears to have been done in order to provide a simple basis for comparing transit times without having to indicate as to each shipment discussed whether the elapsed time shown between pickup and delivery involved a weekend during which time the actual delivery may have been impossible or impracticable. A shipment dispatched from Houston on a Friday normally will not be delivered to a New Orleans consignee until the following Monday, regardless of the time the shipment arrived at the delivering carrier's New Orleans terminal. We find no serious objection to the computations made by the examiner on this basis, particularly since the common practice of carriers involved affords some excuse for delayed deliveries attributable to weekend shutdowns, and more particularly where, as here, the proposed schedules of each applicant indicate that a similar practice will prevail in their operations. Strickland's proposed schedules, for example, provide for the daily dispatch of vehicles from Houston except on Saturdays and Sundays, and, although Southern-Plaza proposes a dispatch 6 days a week, there is still likelihood of delays in those instances where the goods will arrive at destination on weekends or holidays when consignees are unable, or unwilling, to accept delivery. Our examination of the record indicates that the great majority

of the "corrections" made by the examiner in this respect involve weekends or similar periods. There are some instances where the elimination of the intervening weekend does not appear to have been entirely proper, particularly where delivery was not accomplished by the carrier on the first business day after the weekend or holiday; but such instances are relatively few in number and do not materially affect the overall picture presented by the examiner's computations. It should be noted, however, that references by the examiner to a "1-day service" frequently relates to situations involving intervening weekends where the carrier had the shipment in its possession for more than 1 day, was able to perform terminal services in respect thereof, and deliver it to the consignee on the first business day following the weekend or holiday.

Considering the experiences of the supporting shippers, as evidenced by shipping documents presented either by such shippers or by the carriers whose service is challenged, the conclusion is inescapable that their complaints as to excessive and irregular transit times on shipments between the points and over the routes embraced in the application are well founded; and that their desire for a more expeditious and consistent motor service is understandable and reasonable. Herrin and TSC, which provide all or virtually all of the motor service between these points, have demonstrated their ability to provide such a service, but have not done so regularly and consistently. Recapitulating certain figures tabulated by the examiner, and bearing in mind that the examiner's tabulations favor these protestants somewhat, as discussed above, it is

noted that of 692 shipments handled by Herrin and TSC for the supporting shippers from Houston to Baton Rouge, only 379, or about 55 percent, were afforded 1-day service, 207 were afforded 2-day service, and 106 or about 15 percent required 3 days or more for delivery. Of 616 shipments handled by Herrin and TSC for the supporting shippers from Houston to New Orleans, 166 or about 27 percent were afforded 1-day service, 391 were afforded 2-day service, and 59 requried 3 or more days. Between Dallas and Fort Worth, on the one hand, and Baton Rouge and New Orleans, on the other, Herrin and Hall, which together provide virtually all the motor transportation available between the points, are shown to have handled 533 shipments for the supporting shippers, of which 98 were delivered in 1 day, 216 in 2 days, and 219 in 3 or more. From a review of the evidence concerning the past experience of the large number of shippers supporting these applications, it is clear that they have been subjected to a substantial amount of mediocre and poor service between the considered points.

In an effort to rebut the showing made by the supporting shippers, Herrin, Hall, and TSC submitted a series of so-called service exhibits designed to show the nature of their respective services for all shippers during selected periods. The exhibits purported to show the total number of shipments handled during the period indicated between specified points, the number of days required for delivery, and the percentage of shipments handled in 1, 2, 3 or more days. In computing the transit time involved, Saturdays, Sundays, and holidays are excluded. In their exceptions, applicants renew their objections, previously made at the hearing, to the receipt of these exhibits in evidence, and

further urge that, even if found to be admissible, they are entitled to little, if any, weight in determining the issues here considered. We find no error on the part of the examiner in receiving the exhibits in evidence. The question as to the weight to be accorded the evidence in appraising the adequacy of protestants' services, however, is quite another matter which will be discussed more fully below.

A tabulation of the information contained in the so-called service exhibits of Herrin, TSC, and Hall is contained in appendixes S, T, and U to the examiner's report. The material submitted by Herrin covers service during August 1955, and January 1956; that submitted by TSC covers service in June, July, and August, 1955, and January and February 1956; and that submitted by Hall covers service during limited periods in March and July 1955. Hearing on the Strickland application was commenced on September 13, 1955, and direct testimony in support thereof was concluded November 4, 1955. It should be noted, therefore, that except as to the showing made by Hall in March 1955, all of the service depicted by the exhibits was performed in selected periods either immediately prior to, or during the course of, the hearing; and that the service shown to have been performed in 1956, was performed after the great majority of the supporting shippers had testified.

A recapitulation of the service exhibits submitted on behalf of Herrin shows that of 6,934 shipments transported between Houston and New Orleans in August 1955, only about 60 percent were afforded 1-day service. Of 6,985 shipments transported by TSC from Houston to New Orleans in June 1955, and from New

Orleans to Houston in July 1955, 1-day service was provided on a little less than 33 percent. In January 1956, Herrin's 1-day service between the points increased to 70 percent of the shipments, and TSC's 1-day service in January and February 1956, increased to 51 percent of the shipments. During August 1955, Herring handled 768 shipments from Houston to Baton Rouge, of which less than 60 percent were handled in 1-day service. During January 1956, this figure was increased to 72 percent. The service exhibits submitted on behalf of Hall show a substantial amount of poor service. Between Dallas and Fort Worth, on the one hand, and Baton Rouge and New Orleans, on the other, Hall handled 2,190 shipments during the periods indicated. Two-day service was provided on less than 29 percent of these shipments, and 37 percent are shown to have required 4 days or more for delivery.

Taking these service exhibits at their face value, certain conclusions as to transit time are warranted; namely, (1) that the service of Herrin and TSC between Houston and New Orleans during the few months prior to the hearing was substantially better than that previously provided; (2) that the service of each was further improved during the first month or so in 1956, after these proceedings were well under way and after much of the testimony of the shippers had been taken; (3) that at best, Herrin is shown to have provided 1-day service between Houston and New Orleans 70 percent of the time, and TSC only a little better than half the time, and (4) that the service of Hall between Fort Worth and Dallas, on the one hand, and Baton Rouge and New Orleans, on the other, is shown to be substantially below that which shippers

might reasonably expect, and must be classified as poor.

Interchange.—A few of the supporting shippers, from San Antonio, complain of delays incidental to the interchange of their shipments at Houston, and Strickland has experienced a few difficulties in delivering interchange freight to TSC at Houston. Although the record is inconclusive as to the reason therefor, and as to the carrier or carriers responsible, it does not appear that interline traffic moves through Houston with the dispatch which might reasonably be expected.

Discussion and conclusions.—With reference to the Houston-New Orleans traffic situation, with which we are here directly concerned, we are of the opinion that the record as a whole establishes a sufficient amount of consistently mediocre and often poor service over the years to justify the conclusion that the opportunity for competition which exists between Herrin and TSC on motor transportation between the points involved has not resulted in the provision of a reasonably adequate service responsive to the best interest of the public. The desire of the large number of supporting shippers for a more expedited service between Houston and New Orleans is entitled to substantial weight. There is nothing in this record to indicate that the improved service demanded by the public and offered by the respective applicants is in any manner inconsistent with sound operating policies or otherwise unreasonable in any respect. Both Herrin and TSC hold themselves out to provide next-morning or next-day service between the considered points and both have demonstrated their ability to perform such service when they choose to do so. They have further demonstrated, however, that they cannot be depended upon

to provide the type of service of which they are capable, except when faced with an imminent threat of additional competition.

In our decision in *Southern Exp., Inc., Common Carrier Application,* cited above, decided June 10, 1953, which involved issues substantially the same as those here presented, we stated:

> after the instant applications were filed, both Herrin and T. S. C. improved their services between Houston and New Orleans. Some of the shippers fear, however, that without added competition from one or more of the applicants the improved service will be discontinued. In our opinion, the record affords no reasonable basis for such a conclusion.

Here, as in the prior proceeding, Herrin and TSC are shown to have materially improved their Houston-New Orleans services after the filing of the instant application. Even with such improvement, however, Herrin provided next-day delivery on only 60 percent of the shipments transported between Houston and New Orleans in August 1955, and TSC provided next-day service on only 33 percent of the shipments handled between the same points in June and July of 1955. The 70-percent figure attained by Herrin in January of 1956 is more impressive, but we are not convinced that it may be depended upon to continue service on that plane, particularly in view of the deterioration in service noted after the denial of the 1947 applications and the elimination of the competitive stimulus resulting therefrom. TSC's record of only a little over 50 percent next-day service compiled in January and February 1956 is not impressive under any circumstances. We conclude that the existing service of Her-

rin and TSC between Houston and New Orleans is not reasonably adequate to meet the present and future requirements of the public for expeditious motor service; and that the granting of authority for the institution of some additional service is justified.

The question remains as to the amount of additional service which may consistently be authorized without endangering the existing services of Herrin and TSC. There is a substantial amount of motor traffic moving between Houston and New Orleans and also to and from the principal intermediate points such as Beaumont, Lake Charles, Lafayette, and Baton Rouge. For example, figures submitted by Herrin and TSC indicate a daily average tonnage of 830,000 pounds handled between Houston and New Orleans; 110,000 pounds between Beaumont and New Orleans; 117,000 pounds between Houston and Lake Charles; 97,000 pounds between Houston and Baton Rouge; and 141,000 pounds between Houston and Lafayette. In our judgment, the amount of traffic available for movement between the points involved is amply sufficient to support the additional operation of both applicants between Houston and New Orleans and to and from the intermediate points west of Iowa. Further it is sufficient to support the additional operation of 1 of the 2 applicants to and from intermediate points on the northern route through Baton Rouge and points on the southern route through Lafayette. As heretofore indicated, both applicants seek authority over the southern route, but only Strickland seeks authority over the northern route. In the circumstances, we think the equities of the situation compel a grant of authority to Strickland to utilize the northern route, serving

all intermediate points, and a grant to Southern-Plaza to utilize the southern route, also serving all intermediate points. In view of the paucity of evidence concerning a need for additional local service between New Orleans and Baton Rouge and between New Orleans and Lafayette and points intermediate thereto, we shall impose appropriate restrictions on each of the authorities granted to protect the existing local services of Couch, George Garig Transfer, Inc., and Louis Saia Motor Freight Line, heretofore described. No substantial need has been shown for additional service to and from points in the wide radial areas sought surrounding New Orleans, Baton Rouge, Orange, and Lake Charles, and each application will be denied in this respect.

The granting of authority to the extent heretofore indicated will not, in our opinion, materially endanger or impair the operations of existing carriers contrary to the public interest. Both Herrin and TSC are large carriers with extensive and farflung operations. Herrin's operations extend from principal Texas points, on the west, to Jacksonville, Fla., on the east. TSC's operations extend from Houston as far east as Birmingham, Ala., and the company is controlled by Ryder System, Inc., which also controls carriers serving large areas in the East and South. The particular segment of their operations here involved represents only a relatively small portion of their systemwide operations. Even upon the granting of authority herein to the extent noted, they will still enjoy a competitive advantage on traffic moving between Texas points and points beyond New Orleans by reason of the single-line services which they are able to provide through New Orleans.

The proposal of applicants to join or tack any authority granted herein with that presently held for the provision of through service between such Texas points as San Antonio, Fort Worth, and Dallas, on the one hand, and on the other, the Texas and Louisiana points here directly involved, is only incidental to the basic service proposed between Houston and New Orleans. The carriers to be directly affected by this through operation are Herrin, which operates between Dallas and New Orleans, through Shreveport and also through De Ridder, La., and Hall, which operates between Fort Worth and Dallas, on the one hand, and New Orleans, on the other, through Shreveport, Alexandria, and Baton Rouge, La. Here again, the directly affected service of Herrin represents only a relatively small portion of its systemwide service. Hall has been acquired by Braswell Motor Freight Lines, Inc., which operates between principal Texas points and Los Angeles, Calif., and hence the portion of the combined operations here involved is very small. Hall's association with Braswell, which permits single-line service between New Orleans and other Louisiana points and points on the west coast, provides it with a competitive advantage over applicants for such traffic. Additionally, the lines of Herrin and Hall are shorter, by about 100 miles, than those which applicants would traverse through Houston, and they should have no difficulty in competing therewith on a service basis. Couch will probably lose some traffic which it has been moving between Shreveport and New Orleans and other southern Louisiana points in conjunction with Strickland, but its loss in this respect will be primarily in connection with traffic originating at or destined to points in Texas, and traffic which has heretofore been

routed circuitously through Shreveport in lieu of the more normal routing through Houston. The effect of the granting of the applications on the motor-carrier protestants will, we think, be minor and in many instances remote. There is no evidence that there will be any materially adverse effect upon existing rail service in the territory. Most of the supporting shippers prefer motor service to rail service for various reasons, primarily faster deliveries, and on this record it cannot be found that the granting of the applications will result in any substantial diversion of traffic from the railroads.

As seen, Strickland presently holds authority to operate over the proposed route from Houston to Beaumont, but not in the reverse direction. The authority granted herein, to the extent it duplicates that now held by Strickland, shall not be construed as constituting more than a single operating right.

We find in No. MC-59680 (Sub-No. 117) that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities, except those of unusual value, dangerous explosives and household goods as defined by the Commission, commodities in bulk, and those requiring special equipment, between Houston, Tex., and New Orleans, La., from Houston over U. S. Highway 90 to Iowa, La., thence over U. S. Highway 165 to Kinder, La., thence over U. S. Highway 190 to Baton Rouge, La., thence over U. S. Highway 61 to New Orleans, and return over the same route, serving all intermediate points, but with service at Baton Rouge restricted to traffic moving to or from points west of the

Louisiana-Texas State line; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and our rules and regulations thereunder; that a certificate authorizing such operation should be granted, and that in all other respects the application should be denied.

We find in No. MC-10928 (Sub-No. 26), that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities, with the exceptions noted in the finding paragraph above, between Houston and New Orleans, over U. S. Highway 90, through Lafayette, La., serving all intermediate points, but with service at Lafayette and intermediate points between Lafayette and New Orleans restricted to traffic moving to or from points west of the Louisiana-Texas State line; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the act and our rules and regulations thereunder; that a certificate authorizing such operation should be granted; and that the application should be denied in all other respects.

Upon compliance by each applicant with the requirements of sections 215, 217, and 221 (c) of the act and with our rules and regulations thereunder, appropriate certificates will be issued.

An order will be entered denying the applications except to the extent granted herein.

FREAS, *Chairman*, dissenting:

It appears that the complaints of the supporting

shippers in these proceedings are directed principally to the lack of consistent and dependable motor service, insofar as time in transit is concerned. There does not seem to be any substantial question that the present authorized carriers have generally kept up with the economic growth of the area and have correspondingly increased the capacity of their fleets and terminal facilities. Assuming that the evidence substantiates a need, rather than a mere desire, for the proposed regular overnight or 1-day service, it may well be that additional competition is necessary to spur improvement in service, especially in view of the past history of protestants' operations between Houston and New Orleans. Considering, however, the apparent satisfaction of a large segment of the shipping public and the presently authorized carriers, as is evident from the testimony of numerous witnesses appearing on their behalf, and the fact that no need has been shown for a greater quantum, as distinguished from quality, of service, I am not convinced that the record justifies the granting of the two applications. To double the number of the direct single-line carriers between the termini here involved would dilute the available traffic possibly to such a considerable extent that it might eventually result in deteriorated service as well as produce unsound economic conditions, contrary to the objectives of the national transportation policy.

I believe, therefore, that if any authority is to be granted, it should be to one applicant only; provided, however, that such applicant's assurances that it would render an improved service are supported by substantial evidence of record.

The report does not discuss the relative qualifications

of the two applicants for providing a materially better service than that rendered by protestants. The nub of the question is whether any one of these applicants can be relied upon to perform the alleged required service, based upon its past actual record of performance over presently authorized routes when compared with its representations. Indeed, the answer to this question appears to be controlling here in determining whether the interest of the public would in fact be served by a grant of any of the applications, as well as which one should be selected for approval. In this respect, the evidence seems to cast doubt upon the qualifications of either applicant, although indicating that generally Southern Plaza may have had, comparatively, the better performance record.

COMMISSIONER GOFF dissents.

COMMISSIONERS MITCHELL, HUTCHINSON, and WEBB did not participate in the disposition of these proceedings.

APPENDIX "J"

ORER

INTERSTATE COMMERCE COMMISSION
No. MC-C-4472

CENTRAL FREIGHT LINES, INC., ET AL.

v.

STRICKLAND TRANSPORTATION CO., INC.

No. MC-59680 (Sub-No. 117)

STRICKLAND TRANSPORTATION CO., INC., EXTENSION—LOUISIANA ROUTES

POSTPONEMENT OF EFFECTIVE DATE OF ORDER

PRESENT: WILLIAM H. TUCKER, Chairman, to whom the above matter, which is the subject of this order, has been assigned for action thereon.

It appearing, That by judgment entered August 24, 1967, in Civil Action No. 3-1932, the United States District Court for the Northern District of Texas, Dallas Division, sustained the Commission's orders and dismissed the complaint filed February 20, 1967, attacking the above-entitled proceedings;

It further appearing, That by order entered August 28, 1967, the Commission, Acting Chairman Tierney, issued an order (1) establishing the effective date of the Commission's orders of June 13 and December 6, 1966, as October 2, 1967, and (2) provided for the issuance of an amended certificate;

It further appearing, That an amended certificate was inadvertently issued on September 22, 1967;

And it further appearing, That by order entered September 29, 1967, the three-judge district court enjoined the Commission until December 1, 1967, from (1) putting into effect the orders dated June 13 and December 6, 1966, (2) amending the certificate, or (3) changing the *status quo* as existed at the time the complaint was filed, for the sole purpose of giving plaintiff an opportunity to perfect an appeal; and

Upon consideration of the record in the above entitled proceeding and of those matters set forth in the above paragraphs, and good cause appearing therefor:

It is ordered, That the effective date of the order heretofore entered in the said proceedings on August 28, 1967, be, and it is hereby, postponed until December 1, 1967, and that the inadvertently issued certificate dated September 22, 1967, be, and it is hereby, declared to have no force and effect.

Dated at Washington, D. C., this 10th day of October, A.D. 1967.

By the Commission, Chairman Tucker.

(Seal)

H. NEIL GARSON,
Secretary

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DEC 19 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

NO. 839

STRICKLAND TRANSPORTATION CO., INC.,
Appellant

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, CENTRAL FREIGHT LINES, INC., ET AL.,
Appellees

On Appeal From The United States District Court For The Northern District Of Texas

MOTION TO AFFIRM

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IN THE

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NO. 839

STRICKLAND TRANSPORTATION CO., INC.,
Appellant

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, CENTRAL FREIGHT LINES, INC., ET AL.,
Appellees

On Appeal From The United States District Court For The Northern District Of Texas

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MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) appellees Central Freight Lines Inc., Herrin Transportation Company and Roadway Express, Inc. move that the judgment of the district court be affirmed because it is manifest that the question presented is without substance and does not require further argument.

STATEMENT

This is an appeal from a judgment of a three-judge district court which dismissed appellant's action seeking to set aside an order of the Interstate Commerce

Commission in its dockets MC-C-4472, *Central Freight Lines Inc., et al. v. Strickland Transportation Co., Inc.*, and *MC-59680 (Sub-No. 117), Strickland Transportation Co., Inc., Extension—Louisiana Routes* (Appendices A, B, C, F, G and I to Jurisdictional Statement, 102 M.C.C. 291).

The opinion of Circuit Judge Goldberg for the majority of the district court, with one minor exception,[1] accurately and concisely states the nature and long history of the case (Appendix A to Jurisdictional Statement at 26-31). No purpose would be served by repeating that statement.

In the argument below appellees will mention certain errors contained in appellant's statement which adopts verbatim the statement of dissenting District Judge Hughes (Appendix C to Jurisdictional Statement at 39-47, 48). As also indicated below, appellees do not agree with appellant's analysis of what question or questions are presented.

THE QUESTION PRESENTED

When a United States district court on review has

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[1] At page 29 of Appendix A the opinion states:

> "On June 1, 1964, in Cause No. MC-C-4472, the intervening defendants *and the Commission* filed a joint complaint, embracing a petition to reopen and alternatively to reform the Sub 117 Certificate. . . ." (emphasis added)

The Commission was not a complainant-petitioner but was the forum in which appellees' complaint-petition was filed.

set aside an Interstate Commerce Commission order and resulting motor carrier certificate in part and has remanded the case to the Commission for "further consistent proceedings" and the Commission has failed in its first effort to fashion the certificate so as to limit the authorized service as particularly directed by the court, is the Commission powerless later to correct the certificate so as to enforce the court's mandate unless it can also comply with the provisions of Section 212(a) of the Interstate Commerce Act, 49 U.S.C. §312(a)?

ARGUMENT

The judgment of the district court approving the Commission's order and dismissing the action is clearly correct for the reasons stated by the opinions of the judges constituting the majority and for the reasons stated in the report of the Commission (Appendices A, B and F to Jurisdictional Statement).

The singular issue presented was recognized as such and properly answered in the negative by the court below and by the Commission. In most pertinent part the Commission pointed out[2] that the holding and mandate of the district court in *T.S.C. Motor Freight Lines, Inc. v. United States*, 186 F.Supp. 777 (S.D. Tex. 1960), *aff'd sub nom, Herrin Transportation Co. v. United States*, 366 U.S. 419 (1961),

> ". . . specifically found it to be an error of law to grant that portion of the authority

[2]Appendix F to Jurisdictional Statement at 70-71, 102 M.C.C. 291.

> sought as described in (1) and (2) of the language quoted from the court's opinion above for the reason that it was not adequately supported by the evidence and would result in a new service for which the court found no need had been established. This clearly precludes operations of the scope defendant is conducting here because they involve 'service from or through Houston destined to Beaumont (and Orange) * * *, or in the reverse direction.' No further record was made nor were there any supplementary findings which were not expressly stated in our report on further consideration to be in accordance with the opinion and mandate of the court. In the circumstances, *we are bound by the opinion of the court and any broader grant of authority made contrary thereto, however unintended, would fail to meet either its mandate or statutory requirements.*" (emphasis added)

Similarly, the court below reasoned (1) that the Commission was not powerless to correct the certificate because Strickland's "legalistically imaginative but legally unwarranted construction" had not been foreseen (particularly in view of the explicit terms of the mandate in *T.S.C.* which the Commission expressly adopted as the basis of its first re-draft) and (2) that the Commission was simply without power to act except in accord with the mandate. In short the court said:

> "By inadvertently fashioning a certificate inconsistent with the court's mandate, the Commission became bound to amend the certificate to conform to the mandate, whether it took two or two dozen later efforts to properly effectuate the court's order. Courts are not procedural pawns whose opinions can be frus-

trated through administrative misadventure."[3]

As demonstrated, for example, by the different construction of the restriction in Strickland's 1961 Sub 117 certificate made by the Commission's examiner here,[4] the "administrative misadventure" in the Commission's process of fashioning the 1961 certificate is understandable. The mistake was not so apparent as the difference between the colors black and white. The restrictive language chosen in 1961 was not as precise as it might have been, but in 1961, and now, such language was certainly subject to an interpretation that it did in fact prescribe Strickland's new through services from Beaumont and Orange "through Houston" to St. Louis, Chicago, etc., and vice versa which the court in *T.S.C.* directed the Commission not to authorize. As noted by the opinions of the court below,[5] the mistake of the Commission in its fashioning of the restrictive language in 1961 was a mere linguistic or semantic misadventure whereas its controlling, express and conscious decision and order on remand was to conform strictly to the court's mandate and to grant nothing denied by the district court at Houston.

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[3]Appendix A to Jurisdictional Statement at 33.

[4]Appendix F to Jurisdictional Statement at 65. Various Commission reports support the examiner's construction. *E.g., Transamerican Freight Lines, Inc. —Interpretation of Certificate*, 95 M.C.C. 121, 125 (Op. Rts. Rev. Bd. No. 3, 1964), *affirmed, Transamerican Freight Lines, Inc. v. United States*, 258 F.Supp. 910 (Del. 1966), 1966 F.C.C. ¶81,846.

[5]Appendix A to Jurisdictional Statement at 35; Appendix B to Jurisdictional Statement at 36, 37.

In effect appellant's arguments are twofold. First appellant contends that the Commission has no inherent power to correct certificates fashioned and issued by mistake in such form as not to conform (1) with the mandate and order of a reviewing court and (2) with the Commission's expressed intent to comply with such mandate unless the Commission's mistake in fashioning the certificate is discovered and complained of within 30 days or Section 212(a) is complied with. (Jurisdictional Statement at 3, 13-20) Secondly, and apparently in the alternative, appellant contends that if the Commission is held to have such a power to correct, still the order under review is erroneous in that there is nothing to correct because *if* the mandate of the court in *T.S.C.* were construed to prohibit only new *local* service on the involved route between Houston and Beaumont-Orange, and not to apply as well to prohibit new through service, then, in that event, the 1961 certificate did conform to the court's mandate.*

Both arguments are patently without substance.

The authorities cited by the district court establish that in those circumstances wherein through inadvertence or mistake in the process of fashioning a certificate the form of the certificate does not conform with the Commission's own decision and order, but purports to authorize new services not found to be needed and clearly beyond the Commission's expressed inten-

*The Court will note that appellant's statement as well as its argument, as those of dissenting District Judge Hughes, are made to conform to these two basic positions.

tion to grant, the Commission has the inherent authority, power and duty to correct the erroneous certificate, on its own motion or otherwise, whenever such error is found and without respect to Section 212(a) or the Commission's rules governing the filing of petitions for reconsideration. *A fortiori*, the Commission has such power of correction where, as here, the outstanding certificate is found not to conform with the decision, order and mandate of a reviewing court decreeing that on remand certain specifically described through services via Houston should not be authorized and the Commission's only expressed and conscious decision was to conform the certificate to such mandate.

Although appellant's first argument is at least "legalistically imaginative," appellant's second argument lacks even that attribute. Ostrich like, this second argument simply ignores the fact that subparagraphs "(1)" and "(2)" of the court's footnote 42 in *T.S.C.* ordered that under its Sub 117 certificate Strickland would not be permitted to engage in any transportation from Chicago, St. Louis, etc. "through" Houston to Orange, Beaumont or any intermediate points between Houston and Orange, or vice versa. *If* the words "or through" had not been used appellant's argument (Jurisdictional Statement at 21-23) would be appropriate. But those plain words *were* a part of the reviewing court's mandate, and the Commission's interpretation thereof as proscribing new through service over the Houston gateway as well as new local service (Judisdictional Statement at 68) could not be

seriously questioned even if the point were reviewable.[1]

CONCLUSION AND PRAYER

For the foregoing reasons the district court's judgment should be affirmed, and appellees so pray.

Respectfully submitted,

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[1] In its Jurisdictional Statement at 2, 5 and 21 appellant expressly recognizes that new service "through" Houston as well as new local service from Houston to points on the involved route, and vice versa, was proscribed by the district court in *T.S.C.*, and in open court below and before the Commission appellant's counsel made the same admissions stating, contrary to dissenting Commissioner Bush (Appendix F to Jurisdictional Statement at 74-75), that no factual or legal challenge was being made against the court's decree in *T.S.C.*

PROOF OF SERVICE

I, Phillip Robinson, one of the attorneys for Central Freight Lines, Inc., Herrin Transportation Company and Roadway Express, Inc., Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 18th day of December, 1967, I served copies of the foregoing Motion To Affirm on the several parties hereto as follows:

(1) On Strickland Transportation Co., Inc. by mailing copies, in duly addressed envelopes with air mail postage prepaid to Ewell H. Muse, Jr., 415 Perry-Brooks Building, Austin, Texas 78701; and Ralph W. Currie, 1011 Texas Bank Building, Dallas, Texas 75202.

(2) On the United States of America by mailing copies, in duly addressed envelopes with air mail postage prepaid to Erwin N. Griswold, Solicitor General, Department of Justice, Washington, D. C. 20530; Donald F. Turner, Assistant Attorney General, Department of Justice, Washington, D. C. 20530; Howard E. Shapiro, Attorney, Department of Justice, Washington, D. C. 20530; and Melvin M. Diggs, United States Attorney, United States Court House, Fort Worth, Texas.

(3) On the Interstate Commerce Commission by mailing copies, in duly addressed envelopes with air mail postage prepaid, to Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington, D. C. 20423; and Nahum Litt, Attorney, Inter-

state Commerce Commission, Washington, D. C. 20423.

(4) On Missouri Pacific Railroad Company and Southern Pacific Company by mailing a copy, in a duly addressed envelope with first class postage prepaid, to Charles L. Ford, Jr., General Attorney, Texas Railroad Association, P. O. Box 717, Austin, Texas 78767.

Phillip Robinson

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 830

STRICKLAND TRANSPORTATION CO., INC., APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16 (1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court dismissing an action brought by appellant to set aside and prohibit enforcement of an order of the Interstate Commerce Commission in its Docket No. MC-C-4472, *Central Freight Lines, Inc. v. Strickland Trans. Co., Inc.* (U.S. App. F, 102 M.C.C. 291).[1] The Commission's

[1] This report embraced No. MC-109680 (Sub-No. 117), *Strickland Transp. Co., Inc. Extension—Louisiana Points.*

285-345—67

order amended appellant's certificate of public convenience and necessity for motor vehicle carriage to make it conform to a prior judicial decision with regard to the service authorized for Houston, Beaumont, and Orange, Texas (J.S. App. F).

On June 21, 1954, appellant applied for a certificate of public convenience and necessity authorizing operation as a general commodities common carrier between Houston, Texas, and New Orleans, Louisiana. On October 14, 1958, the Commission granted the certificate, essentially as sought by appellant, including the servicing of all intermediate points along the route between Houston and New Orleans (J.S. 143). Several motor vehicle common carriers who served cities along the Texas portion of that route brought a timely action for review of the Commission's order. On August 1, 1960, the district court affirmed the Commission's order in most part but set aside that portion which authorized appellant's service between Houston and Beaumont-Orange, Texas, and points intermediate thereto (J.S. App. H). *T.S.C. Motor Freight Lines Inc., et al.* v. *United States, et al.*, 186 F. Supp. 777 (S.D. Tex. 1960), affirmed *per curiam sub nom. Herrin Transportation Co.* v. *United States, et al.*, 366 U.S. 419.

In remanding the matter to the Commission, the district court stated, in quite specific terms, the restrictions to be put on appellant's authority:

> As the case has to be remanded to the Commission with respect to this phase, we do not undertake to set this forth in terms having the

precision of a certificate. But under our holding, except for Strickland's existing authority, the applicants will not be permitted to engage in the following transportation:

(1) Service from or through Houston destined to Beaumont or any point between Houston and Beaumont, or in the reverse direction,

(2) service from or through Houston destined to Orange or any point between Houston and Orange, or in the reverse direction,

(3) service from points east of Orange-Beaumont destined to any *intermediate point between* Orange-Beaumont and Houston, or in the reverse direction. (This would not restrict, for example, a shipment from Baton Rouge to Orange or Beaumont, or the reverse.)[1]

Acting with the express purpose of complying with the decree of the court, the Commission modified appellant's certificate to revoke authority for serving intermediate points in Texas except for: "Serving the intermediate points of Orange and Beaumont, Tex., restricted to traffic moving to or from points east of the Texas-Louisiana State line" (J.S. 83). The Commission's order was issued on March 15, 1961, and no timely petition for reconsideration was filed.

The present controversy arose in 1964 when appellant instituted service *through* Houston between Orange-Beaumont and points east of a northerly extension of the Texas-Louisiana line but north of the Arkansas-Louisiana line, for example, moving ship-

[1] 186 F. Supp. 777, 794 n. 42 (S.D. Tex.).

ments from St. Louis, Missouri, through Houston to Beaumont. On June 1, 1964, several interested motor carriers and railroads (intervening appellees in this Court) filed a complaint with the Commission alleging a violation of appellant's certificate and praying for a cease and desist order, or, in the alternative, a further modification of the certificate to make more specific its compliance with the mandate of the court (J.S. 29-30).[3] The hearing examiner concluded that appellant was operating beyond the authority of its certificate and recommended a cease and desist order (J.S. 65). The Commission rejected that recommendation on the ground that the modified certificate, by its terms, permitted the service complained of (J.S. 70). Since this result would have been inconsistent with the district court's mandate not to permit movements through Houston, the Commission concluded that it had no alternative but to issue a second amended certificate (J.S. 71).

Appellant thereupon brought this action to set aside and enjoin the decision and order of the Commission. The statutory three-judge court determined, one judge dissenting, that the Commission expressly intended to follow the mandate of the district court in modifying appellant's certificate on remand in 1961; that the Commission's 1961 modification was inconsistent with the mandate of the district court; that

[3] A separate petition seeking solely to reopen the Sub-No. 117 proceeding was also filed on May 31, 1964. After extensive pleadings were filed by all parties, the Commission denied the separate petition in September 1964, having previously set the complaint for disposition under modified procedures.

the Commission became bound to correct this error; that the Commission had the authority to modify the certificate, and indeed would have been recreant if it had not done so; and that the Commission did not have to comply with the hearing provisions of § 212(a) of the Interstate Commerce Act, 49 U.S.C. § 312(a), in correcting its inadvertent mistake (J.S. App. A). The district court approved the order of the Commission (J.S. 35) and dismissed appellant's complaint (J.S. App. D).

ARGUMENT

The decision below is correct, and this appeal does not present a substantial question warranting plenary review by the Court. The sole issue decided below was whether the Commission after full administrative proceedings properly exercised its authority to revise a certificate of public convenience and necessity to comport with the mandate of a three-judge district court.

It is well settled law that when a court has exercised jurisdiction to review and suspend a report and order of an administrative agency, the agency must comply with the court's order. *Inland Steel Co. v. United States*, 306 U.S. 153, 160. Section 212(a),[1] which re-

[1] Section 212(a) provides, in pertinent part:

(a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may, after notice and hearing, be suspended, changed, or revoked in whole or in part, for willful failure to comply

quires the Commission to hold hearings prior to modification under certain circumstances, is a limitation on the independent powers of the Commission but not upon the powers of a federal court or, by implication, those of the Commission in carrying out a court remand. See *Asbury Transportation Co.* v. *United States*, 236 F. Supp. 322 (S.D. Calif. 1964). The purpose of the Commission's second modification of the certificate was merely to correct an error of inadvertence in framing the first modification, and not to effectuate any intervening change in policy, which would have required a hearing under § 212(a). *American Trucking Assns.* v. *Frisco Co.*, 358 U.S. 133. It is not material that *Frisco* involved a ministerial error of the Commission's staff, while this case concerns a failure of draftsmanship. It is plain from the Commission's express intention to conform the certificate to the mandate of the first court that its failure to choose language adequate to achieve that purpose was inadvertent, and the court below so found (J.S. 35). See also *Willey* v. *United States*, 245 F. Supp. 669 (E.D. Ill. 1965); *James J. Williams, Inc.* v. *United States*, 241 F. Supp. 585 (E.D. Wash. 1965).

Finally, appellant was not prejudiced by reason of the Commission's failure to invoke § 212(a). As the court below found, appellant was placed on notice by the complaint of intervening appellees that the con-

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with any provision of this chapter, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license. * * *

troversy before the Commission would center upon whether the amended certificate conformed to the mandate of the first three-judge court, and participated fully in hearings in which the proper interpretation of footnote 42 was considered (J.S. 29-30, 35, 36).

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted.

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DECEMBER 1967.

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NO. 839

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

STRICKLAND TRANSPORTATION CO., INC.
Appellant

Vs.

UNITED STATES OF AMERICA, et al.,
Appellees.

ON APPEAL FROM NO. CA-3-1932
IN THE UNITED STATES DISTRICT COURT
FROM THE NORTHERN DISTRICT OF TEXAS,
DALLAS DIVISION

REPLY TO MOTIONS TO AFFIRM

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REPLY TO MOTIONS TO AFFIRM

This Reply is to the Motions to Affirm filed herein by appellees United States of America, Interstate Commerce Commission and Central Freight Lines, Inc., et al.

As shown in appellant's Jurisdictional Statement the Commission acted on its own motion, without notice or hearing, and in a collateral proceeding, to amend appellant's certificate which was issued in 1961.

Both motions to affirm ignore the fact that (1) appellant was not afforded any hearing to enable it to argue to the Commission that the 1961 certificate did

in fact conform to the Court's mandate and (2) the Commission modified appellant's certificate without a hearing in compliance with Section 212(a) of the Act, and without discussion of the parties on the issue as to whether or not the 1961 certificate complied with the Court's mandate.

In summary, appellant has never been given any opportunity to present to the Commission its argument that the 1961 certificate does in fact comply with the Court's mandate. The Commission acted without giving appellant an opportunity to do so, thereby depriving appellant of its right to a hearing as required by Section 212(a).

Appellees apparently concede that the action of the Commission was not the correction of a clerical or ministerial error, but contend nevertheless that the Commission has the power to change a final decision consciously arrived at and to modify a final certificate without compliance with Section 212(a). This is violative of the express provisions of Section 212(a) which requires notice and hearing before such action may be taken, and is contrary to *American Trucking Associations, Inc. v. Frisco Transportation Co.*, 358 U. S. 133, and *Watson Bros. Transportation Co. v. United States*, D.C.-Neb., 132 F. Supp. 905 Aff'd., 350 U. S. 927, 76 S. Ct. 302, 100 L. Ed. 810.

Appellant prays that the Motions to Affirm filed herein by appellees be overruled and denied.

Respectfully submitted,

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PROOF OF SERVICE

I, Ewell H. Muse, Jr., one of the attorneys for Strickland Transportation Co., Inc., Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 4th day of January, 1968, I served copies of the foregoing Reply to Motions to Affirm on the several parties hereto as follows:

(1) On the United States of America by mailing copies, in duly addressed envelopes with air mail postage prepaid to Erwin N. Griswold, Solicitor General, Department of Justice, Washington, D. C. 20530; Mr. Donald F. Turner, Assistant Attorney General, Department of Justice, Washington, D. C. 20530; Mr. Gregory B. Hovendon and Mr. Robert Eliot Easton, Attorneys, Department of Justice, Washington, D. C. 20530; and Mr. Melvin M. Diggs, United States Attorney, United States Court House, Fort Worth, Texas.

(2) On the Interstate Commerce Commission by mailing copies, in duly addressed envelopes with air mail postage prepaid, to Mr. Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington, D. C. 20423 and to Mr. Nahum Litt, Attorney, Interstate Commerce Commission, Washington, D. C. 20423.

(3) On Central Freight Lines, Inc. and Roadway Express, Inc., by mailing copy, in a duly addressed

envelope with first class postage prepaid to Mr. Phillip Robinson, The 904 Lavaca Building, Austin, Texas 78701.

(4) On Herrin Transportation Company, Inc., by mailing copy, in a duly addressed envelope with first class postage prepaid to Mr. Leroy Hallman, 4555 First National Bank Building, Dallas, Texas 75202.

(5) On Missouri Pacific Railroad Company and Southern Pacific Company by mailing a copy, in a duly addressed envelope with first class postage prepaid, to Mr. Charles L. Ford, Jr., General Attorney, Texas Railroad Association, P. O. Box 717, Austin, Texas 78767.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

STRICKLAND TRANSPORTATION CO., INC. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS.

No. 839. Decided January 15, 1968.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.